REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

TRANSFERRED CASE (C) NO. 6 OF 2009

Mahesh Chandra Gupta … Petitioner

versus

Union of India & Ors. … Respondents

J U D G M E N T

S.H. KAPADIA, J.

The President of India by a Warrant dated 6.8.2008 under her hand and seal appointed Dr. Satish Chandra, Respondent no. 3 herein as Additional Judge of Allahabad High Court.

2. The question for consideration is: whether appointment of Respondent no. 3 as Additional Judge of Allahabad High Court was an infraction of Article 217(2) and Article 217(1) of the Constitution of India? Was he qualified for appointment as a Judge – if so – has the mandatory process of consultation under the Constitution stood followed?

Background Facts:

3. Shri Mahesh Chandra Gupta (Respondent no. 1 in S.L.P.(C) No. 25859/08), a practicing advocate, filed a Writ Petition under Article 226 of the Constitution before the Allahabad High Court on 18.8.2008 challenging the appointment of Respondent no. 3 herein as an Additional Judge of the Allahabad High Court on the ground that he was not eligible for such an appointment. The Original Petitioner prayed for issuance of quo warranto directing Respondent no. 3 as a Judge of Allahabad High Court to show the authority of his Office and to justify the constitutionality of his appointment as a Judge of Allahabad High Court. According to the original petitioner, Respondent no. 3 herein lacked basic eligibility qualification; that Respondent no. 3 had not practiced as an advocate for at least ten years in the Allahabad High Court and that Respondent no. 3 did not hold Judicial Office of a judicial service subordinate to Allahabad High Court. In the original petition, the challenge was only on the ground of lack of eligibility but not on suitability and/or want of effective consultation process, which grounds were taken later on by supplementary affidavits.

4. On 10.9.2008 an Order was passed by the Division Bench of the Allahabad High Court directing production of Record of the Proceedings before the High Court Collegium pertaining to the recommendations made

by the High Court Collegium in regard to appointment of Respondent no. 3 as Additional Judge of Allahabad High Court. In compliance, on 12.9.2008 the requisite record was produced for perusal by the Division Bench of the High Court in a sealed cover. The record inter alia contained the letter of recommendation made by the High Court Collegium together with the enclosure/annexures thereto. The letter of recommendation of the High Court Collegium was read by the Division Bench and since the said letter referred to the Report of the Sub-committee of three Judges of the High Court, the Division Bench of the High Court required that the Report of the Sub-Committee be shown to them on the date fixed.

5. On 17.9.2008, the impugned order was passed by the Division Bench of the Allahabad High Court in following relevant terms:

> "The collegium proceedings were produced before us on 12.09.2008 in a sealed cover in open Court. The said record was returned within a few minutes of its being produced before us.
>
> However, a perusal of the recommendation made by the collegium indicated that the recommendation on the persons proposed to be elevated from the source 'service' (including the third respondent) was made by the collegium on the recommendation of a Committee of three Hon'ble Judges of this Court constituted specially for the purpose. The report of the said committee was specifically referred to in the letter of recommendation sent by Hon'ble the Chief Justice, and endorsed by the other two members of the collegium. However that

report did not appear to have been sent to the other Constitutional functionaries along with the recommendation of the collegium, nor that report was part of the record which was produced before us. Accordingly on 12.09.2008, we had orally required the High Court to produce the said report before us in a sealed cover, with an understanding that at this stage the said report would not form part of the official record of this case nor it would be made public. Sri S.P. Gupta, Senior Advocate assisted by Sri Amit Sthalekar, Advocate, expressed their inability to produce the said report on the same day and we accordingly orally permitted them to produce it on the next date already fixed in the case i.e. 16.09.2008.

However, on 16.09.2008 the report was not produced and Sri S.P. Gupta sought 24 hours time to seek further instructions in that behalf. The matter was, therefore, posted for today.

Today, Sri S.P. Gupta assisted by Sri Amit Sthalekar, stated that the High Court has declined to produce the Committee's report for the perusal of the Bench even in a sealed cover, despite the understanding that the report would not be made public. We are unable to comprehend any plausible reasons for this unusual stand taken by the High Court.

The Supreme Court in the case of PUCL Vs. Union of India AIR 2004 SC 1442 went to the extent of holding that public disclosure of information should be generous and that non-disclosure could be justified only on considerations of public interest. Here it is not even a case of public disclosure. Refusal to show an official document even to the Court, that too by an institution like the High Court, would require exceptionally strong reasons having regard to the impact of such act on the public confidence in the Judicial system.

> Therefore, having regard to the need to maintain public confidence in this institution particularly in the present times, we have little option except to pass this order directing that the report be produced before us on 25th September, 2008.
>
> We make it clear that if the High Court proposes to claim privilege or raise any other objection to the production of the report, it will be open to the High Court to do so, but in writing by way of an application. If such an application is moved on or before 25.09.2008, it will not be necessary for the High Court to produce the Committee's report unless those objections are heard and disposed of.
>
> Put up on 25th September 2008."
>
> (emphasis supplied)

6. It is at that stage that Allahabad High Court (Respondent no. 2 in the original writ petition) came to this Court by way of Transfer Petition (C) No. 1186 of 2008. By Order dated 18.2.2009, which is a speaking order, this Court withdrew the Writ Petition, filed by Shri Mahesh Chandra Gupta, from the file of Allahabad High Court and transferred the same to this Court. This is how the matter is before us.

Contentions:

7. Shri R.K. Jain, learned senior counsel appearing on behalf of the Original Petitioner in the High Court, firstly submitted that, for qualifying under Article 217(2)(b) read with Explanation (aa) of the Constitution a person who has held a Judicial Office or the office of a Member of a

Tribunal for more than ten years, but has not practiced as an Advocate even for a day though enrolled as an Advocate, cannot be said to be eligible for appointment as a High Court Judge. According to the learned counsel, mere enrolment which gives "a right to practice" is not enough to make a person eligible under Article 217(2)(b). According to the learned counsel, right to practice is one thing and having practiced is another thing and, therefore, not actually practicing but having acquired a right to practice would not constitute a qualification under Article 217(2)(b) of the Constitution. In support of his above argument, learned counsel submitted that Explanation (aa) though termed as an "Explanation" is in effect in the nature of a proviso, which cannot be torn apart of the main enactment. According to the learned counsel, Explanation (aa), appended to Article 217(2)(b), cannot provide for necessary qualification, which is contained only in Article 217(2)(b) of the Constitution. In the alternative, without admitting that respondent no. 3 had the qualification of being an Advocate of a High Court within the meaning of Article 217(2)(b), learned counsel urged that even if a mere "right to practice" amounts to <u>having praticed</u>, if a person after having remained an Advocate for some time, ceases to practice and employs himself for earning, and thereafter holds an office of a Member of the Tribunal, the period of his holding the office as a Member cannot be computed or taken into account

with the aid of Explanation (aa) to Article 217(2)(b) of the Constitution. In this connection, learned counsel pointed out that between 1975 to 1997, respondent no. 3 remained in service at various places, he became a Member of the Tribunal and worked as a Member between 3.12.1997 and 6.8.2008, therefore, according to the learned counsel, since respondent no. 3 had ceased to practice from 1975 to 1997, the period during which respondent no. 3 worked as a Member of the Tribunal ought not to be computed with the aid of Explanation (aa) to Article 217(2)(b) of the Constitution. According to the learned counsel, on the facts of this case, there was consultation by the members of the two Collegiums based on the performance of respondent no. 3 as a Member of a Judicial Tribunal; that the source of respondent no. 3 appointment stood shown as from "service" but there was no consultation regarding his appointment under Article 217(2)(b). According to the learned counsel, the performance of respondent no. 3 during the period he held the office of the Member of a Judicial Tribunal, cannot be said to be "a consultation" as, in this case, there was neither any consultation regarding the period during which respondent no. 3 could be said to have held Judicial office under Article 217(2)(a) nor on his having practiced as an Advocate for ten years under Article 217(2)(b), which was the basic eligibility criteria. Learned counsel next urged that for being

eligible to be appointed a Judge of a High Court under Article 217(2)(b) of the Constitution, a person needs to be an Advocate of a "High Court". In this connection, learned counsel emphasized the expression "an advocate" in Article 233(2) in contradistinction to the expression "an advocate of a High Court" in Article 217(2)(b) and submitted that this difference is not insignificant. According to the learned counsel, for appointment to the post of a High Court Judge, the person has to be an advocate of a High Court whereas for appointment in the District Court, he may not be an advocate of a High Court but simply "an advocate". In this connection, reliance was placed on the judgment of this Court in the case of **Prof. C.P. Agarwal v. C.D. Parikh** reported in AIR 1970 SC 1061. At this stage, it may be mentioned that vide para 9 of the judgment in **Prof. C.P. Agarwal's** case (supra) this Court observed that the distinction between the words "an advocate" under Article 233(2) and the words "an advocate of a High Court" in Article 217(2)(b) have no significance after coming into force of the Advocates Act, 1961 ("1961 Act" for short), which lays down that, after the 1961 Act, there are only two classes of Advocates, i.e., Advocates and Senior Advocates entitled to practice. According to the learned counsel, the ratio of the judgment of this Court in **Prof. C.P. Agarwal's** case (supra) is per incuriam. In the alternative, learned counsel urged that, in any case, after

the Forty-fourth Constitutional Amendment (by which Explanation (a) stood inserted), para 9 of the judgment in **Prof. C.P. Agarwal's** case (supra) became irrelevant because by Explanation (a) the expression "an advocate of a High Court" has again appeared, which indicated the intention of Parliament that the eligibility for appointment of a Judge is to be a practicing advocate of High Court and not merely enrolment as an advocate. Learned counsel next urged that respondent no. 3 obtained his appointment allegedly by giving misleading facts amounting to perpetrating fraud. In this connection, reliance was placed on certain paragraphs of the writ petition as well as of the 4th Supplementary Affidavit dated 27.8.2008. The main allegations in this regard are – that, respondent no. 3 has never practiced either in the High Court or in any District Court of U.P.; that, he had represented of having practiced in the Allahabad High Court between 1975 and 1977 when, in fact, he had not practiced in that High Court; that, between 1977 to 1989 he had worked as a professor in the law colleges at Bikaner, Bareilly, Rohtak and Shimla and thereafter between 1989 to 1997 he stood employed at various posts in and out of India. These details were collected from the website of Delhi Income Tax Appellate Tribunal and on the basis of the said inputs, it has been alleged that respondent no. 3 did not practice law after 1977. According to the learned counsel, respondent no. 3

had never practiced at Allahabad High Court even between 1975 and 1977 though he stood enrolled as an Advocate of the High Court on 13.9.1975. This, according to the learned counsel, constituted practicing fraud. According to the learned counsel, it is correct to say that in matters of appointment, the scope of judicial review stood confined only to two grounds, namely, lack of eligibility and lack of consultation but fraud, according to the learned counsel, vitiates every action and, in this case, respondent no. 3 got himself appointed as a Judge of Allahabad High Court by practicing fraud and consequently his appointment stood vitiated. Learned counsel next urged that, in this case, reliable information was withheld by the Chief Justice of the Allahabad High Court from the Supreme Court Collegium; that elimination of judicial review did not mean elimination of judicial scrutiny of the consultation process and if in a given case like the present one "reliable information" mentioned in the Report of the three Judges Sub-committee stood withheld from the Supreme Court Collegium then such withholding of information would certainly fall in the category of lack of consultation. According to the learned counsel, a three Judges Sub-Committee was appointed by the Chief Justice of Allahabad High Court to examine the quality of judgments of the persons coming under the zone of choice from "service" quota and if the Sub-committee gave

adverse comments about the reputation of respondent no. 3, which was not forwarded to the Supreme Court Collegium, then such an act would constitute withholding of reliable information, which would make this case fall in the category of lack of effective consultation. In this connection, learned counsel placed reliance on paragraphs 29 and 32 of the judgment of this Court in Re. **Special Reference No. 1 of 1998** reported in (1998) 7 SCC 739. According to the learned counsel, initiation comes by recommendation of the Chief Justice of the High Court on which the Supreme Court Collegium places reliance and, therefore, it was expected of the Chief Justice of the High Court not to withhold the relevant information from the Collegium of the Supreme Court, which information existed in the Sub-committee of three Judges of the High Court giving adverse comments about the reputation of respondent no. 3. On the basis of the aforestated submissions, learned counsel urged that judicial review on the ground of lack of consultation cannot be eliminated in this case.

8. Shri Harish N. Salve, learned senior counsel appearing on behalf of the Allahabad High Court submitted that interpretation of Article 217(2)(b) is no longer res integra. According to the learned counsel, the expression "an advocate of a High Court" was placed in the Constitution at a time when the practice of advocates was governed by Indian Bar Councils Act, 1926

("1926 Act" for short). Under Section 2 of that Act, "an advocate" was defined to mean "an advocate entered in the roll of advocates of a High Court under the provisions of the Act". Under Section 8 of that Act, it was inter alia provided that: "no person shall be entitled as of right to practice in any High Court, unless his name is entered in the roll of advocates of the High Court maintained under this Act". Therefore, according to the learned counsel, the fundamental requirement under the 1926 Act was enrolment in the High Court in order to be eligible. However, enrolment gave a right to practice. Therefore, a person who had such a right to practice was alone eligible for elevation. According to the learned counsel, the 1961 Act, however, made a fundamental change in the scheme of law as it provided that every advocate who is enrolled with the Bar Council is entitled to practice in India. The job of maintaining roll of advocates is entrusted to State Bar Councils (see Section 17 of 1961 Act). Once a person stood enrolled with a State Bar Council, he could practice in any court in India unlike the earlier law where he could practice as of right only in that High Court in which he was enrolled as an Advocate. Therefore, according to the learned counsel, with the advent of the 1961 Act, the expression "an advocate of a High Court" lost special significance, as any advocate enrolled with the State Bar Council was entitled to practice in the High Court subject

to any rules which may be made by the court to regulate practice in that court (see Article 145(1) of the Constitution). According to the learned counsel, with the fundamental changes brought about by the 1961 Act, the expression "an advocate of a High Court" was understood post-1961 to mean any person entitled to practice in a High Court. In other words, any person whose name was enrolled on the State Bar Council is now regarded as an advocate of the High Court. It is in this context that the expression "an advocate of a High Court" under Article 217(2)(b) lost special significance, which it had in the past. In the past, according to the learned counsel, special significance was attached to the said expression only to delineate an advocate from other legal practitioners like, vakils, pleaders, attorneys etc., who were not enrolled in the High Court. According to the learned counsel, this aspect has been brought out in the judgment of this Court in **Prof. C.P. Agarwal's** case (supra). (see para 5 of that judgment). In that case, it has been held that the distinction between the words "an advocate" in Article 233(2) and the words "an advocate of a High Court" in Article 217(2)(b) has no significance after coming into force of the 1961 Act. According to the learned counsel, the judgment of this Court in **Prof. C.P. Agarwal's** case (supra) completely negates these suggestions that the expression "an advocate of a High Court" should be construed as a person who is actually

practicing as an advocate of the High Court. Learned counsel next urged that clause (aa) was inserted in 1978 to widen the sphere of those who became eligible for elevation. Under that clause, the period during which a person holds office as a member of a Tribunal requiring special knowledge of law, has to be added to the period during which such a person has been an advocate of a High Court. According to the learned counsel, clause (aa) requires such period to be added to the years during which a person was entitled to practice at the Bar in order to determine whether threshold limit of ten years stood crossed. According to the learned counsel, if insistence upon ten years of actual practice was a constitutional requirement then clause (aa) would be rendered nugatory because clause (aa) assumes that a person who otherwise does not satisfy the requirement of ten years of actual practice can still fall under Article 217(2)(b) if a person had a right to practice for a short period of time followed by his becoming a member of a Tribunal for ten years. According to the learned counsel, clause (aa) negates the suggestion that actual practice is the constitutional requirement of Article 271(2)(b). Learned counsel next submitted that there is a conceptual difference between "eligibility" and "desirability" for elevation. In this connection, it was submitted that a person who has been an advocate enrolled for ten years, who has been an enrolled advocate and who has held

office as a member of a Tribunal, the total of which exceeds ten years, is eligible for elevation. However, the converse is not true, namely, not all persons, who have been advocates for ten years or have held office of the Tribunal after being enrolled for a period of ten years are worthy of being elevated. It is only when a collegium is satisfied that a person is worthy of being elevated, that it recommends appointment to the High Court. The evaluation of the worth and the merit of a person as a member of the Tribunal is done by considering his judgments and orders and such evaluation by the collegium has no bearing on the eligibility of a candidate for elevation. Learned counsel next urged that, there is no merit in the contention advanced on behalf of the Original Petitioner that since respondent no. 3 was shown as a service judge, he should have been considered under Article 217(2)(a). According to the learned counsel, for the High Court, the Constitution does not create any such quota. It merely prescribes the eligibility criteria. It is purely by convention that, in order to have a healthy mix of those from the Bar and those who have had past experience of working as judicial officers/officers in the Tribunals that a policy decision stood adopted in the Chief Justices' Conference of 2002, which extended the ambit of appointment to take within its sweep members from Income Tax Appellate Tribunal ("ITAT" for short). This was a pure

policy decision taken in the said Conference. For that purpose, it was decided that when members of ITAT are elevated, they may be counted from "service quota". Therefore, according to the learned counsel, it is obvious that for eligibility purpose, one has to read clause (aa) of the Explanation with Article 217(2)(b) in cases of elevation of members of ITAT. According to the learned counsel, the said policy decision has no relevance to the question of eligibility of the person elevated. According to the learned counsel, there is no merit in the challenge of the original petitioner based on lack of effective consultation. According to the learned counsel in the judgment of this Court in **Supreme Court Advocates-on-Record Association and Ors. v. Union of India** reported in 1993 (4) SCC 441, Verma, J., as he then was, speaking for the majority held, that in the matter of primacy, the fundamental assumption was a participatory role of each of the functionaries; that the question of primacy is best avoided by each Constitutional functionaries remembering that all of them are participants in a joint venture, the aim of which is to find out and select the most suitable candidate. It was further observed that primacy was a solemn duty to be discharged only where it became strictly necessary. In the said judgment, dealing with the question of justiciability, this Court explained that "the reduction of the area of discretion to the minimum, the element of plurality

of Judges in formation of the opinion of the Chief Justice of India, effective consultation in writing, and prevailing norms to regulate the area of discretion are sufficient checks against arbitrariness." Relying on the said judgment, learned counsel submitted that, in the present case, the safeguard was attained by creating a plurality of institutions including the Chief Justice of India and the Chief Justice of the High Court and therefore there was no occasion for further judicial review as a check or balance on the exercise of power. Learned counsel also placed reliance on the judgment of the Constitution Bench of this Court in Re. **Special Reference No. 1 of 1998 (supra)** in which it was clarified that the moment a consultation process stood complied with, the content of that process was not amenable to judicial review (see para 32). It was clarified that judicial review was admissible only if the views of a Constitutional functionary (consultation with whom is the Constitutional requisite) is not taken into account. It was submitted that the Chief Justice of the High Court is a co-equal functionary and that ideally the appointment should be by unanimity among all functionaries. It was submitted that the Chief Justice of the High Court does not merely provide information to the Supreme Court collegium to enable them to recommend Judges for elevation. Therefore, according to the learned counsel, all this translates into recommendation made by the

collegium of the High Court and that the collegium of the Supreme Court does not sit in appeal over the recommendation of the High Court. In this connection, learned counsel submitted that the Chief Justice of the High Court may in order to advice himself and the members of his collegium take the assistance of other colleagues or information from various sources. However, the process of getting material from the High Court to aid and assist formation of opinion by the collegium of the Supreme Court is a matter between two Constitutional entities (Collegiums) which does not fall within the area of judicial review. It is important to bear in mind, according to the learned counsel, that the material like the Report of the Sub-committee is supplied not in justification of the recommendation but only to assist the Supreme Court Collegium to form an opinion. Therefore, according to the learned counsel, the question as to whether there existed any material with the High Court and the question whether such a material was made available to the Supreme Court is a matter which is incapable of enquiry in proceeding for judicial review. According to the learned counsel, the submission made on behalf of the original petitioner that there was lack of effective consultation because the High Court had material which was not furnished to the Supreme Court Collegium is totally misconceived. Lastly, learned counsel urged that the Original Petitioner has made rank irresponsible

statements in his affidavit dated 15.4.2009 which calls for strictures against the petitioners. In the circumstances, according to the learned counsel, the transferred writ petition should be dismissed.

Relevant Provisions of the Constitution:

9. Before analysing Article 217(1) and (2), we quote hereinbelow relevant provisions of the Constitution.

Article 124(3) of the Constitution reads as follows:

> **"124. Establishment and Constitution of Supreme Court.-**
>
> **(3)** A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and—
>
> (*a*) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or
>
> (*b*) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or
>
> (*c*) is, in the opinion of the President, a distinguished jurist.
>
> ***Explanation I.*** – …
> ***Explanation II***.- In computing for the purpose of this clause the period during which a person has been an advocate, any period during which a person has held judicial office not inferior to that of a district Judge after he became an advocate shall be included."
>
> (emphasis supplied)

Article 217(1) and (2) of the Constitution reads as follows:

> **"217. Appointment and conditions of the office of a Judge of a High Court.-**
>
> **(1)** Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and 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 :
>
> Provided that—
>
> (*a*) a Judge may, by writing under his hand addressed to the President, resign his office;
>
> (*b*) a Judge may be removed from his office by the President in the manner provided in clause (4) of article 124 for the removal of a Judge of the Supreme Court;
>
> (*c*) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.
>
> **(2)** A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and—
>
> (*a*) has for at least ten years held a judicial office in the territory of India; or

(*b*) has for at least ten years been an advocate of a High Court or of two or more such courts in succession;

Explanation.—For the purposes of this clause—

(*a*) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate of a High Court or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law;

(*aa*) in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate."

Article 224(1) reads as follows:

"224. Appointment of additional and acting Judges-

(1) if by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional Judges of the Court for such period not exceeding two years as he may specify."

Article 233(2) reads as follows:

> **"233 Appointment of district judges—**
> (1) …
> **(2)** A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

Section 220(3) of the Government of India Act, 1935 reads as follows:

> **"220. Constitution of High Court.-**
>
> **(3)** A person shall not be qualified for appointment as a judge of a High court unless he –
>
> (a) is a barrister of England or Northern Ireland, of at least ten years standing, or a member of the Faculty of Advocates in Scotland of at least ten years standing, or
>
> (b) is a member of the Indian Civil Service of at least ten years standing, who was for at least three years served as, or exercised the powers of, a district Judge; or
>
> (c) has for at least five years held a judicial office in British India not inferior to that of a subordinate judge, or judge of a small cause court; or
>
> (d) has for at least ten years been a pleader of any High Court, or of two or more such Courts in succession:
>
> Provided that a person shall not, unless he is, or when first appointed to Judicial office was, a barrister, a member of the Faculty of Advocates or a pleader, be qualified for appointment as Chief Justice of any High Court constituted by letters patent until he has served for not less than three years as a Judge of a High Court.

> In computing for the purposes of this sub-section the standing of a barrister or a member of the Faculty of Advocates, or the period during which a person has been a pleader, any period during which the person has held judicial office after he became a barrister, a member of the Faculty of Advocates, or a pleader, as the case may be, shall be included."

Analysis of Article 217(1) and (2):

10. Whether "actual practice" as against "right to practice" is the pre-requisite constitutional requirement of the eligibility criteria under Article 217(2)(b) is the question which we are required to answer in this case. At this stage, we may state that, there is a basic difference between "eligibility" and "suitability". The process of judging the fitness of a person to be appointed as a High Court Judge falls in the realm of "suitability". Similarly, the process of consultation falls in the realm of suitability. On the other hand, eligibility at the threshold stage comes under Article 217(2)(b). This dichotomy between suitability and eligibility finds place in Article 217(1) in juxtaposition to Article 217(2). The word "consultation" finds place in Article 217(1) whereas the word "qualify" finds place in Article 217(2). This dichotomy is succinctly brought out in the *Constitutional Law of India by H.M. Seervai, Fourth Edition, at page 2729*, which is quoted hereinbelow:

> "From Article 217(1) as enacted in 1950 the following things are clear. First, Art. 217(1) provided for the appointment of only permanent High Court Judges. They were permanent in the sense that they continued to hold their office till they attained the age of 60 years. They were not "permanent" as opposed to Addl. Judges who held office for a period not exceeding 2 years, because in 1950 our Constitution did not provide for Addl. Judges. Secondly, Art. 217(2) prescribed the qualifications which a person must possess before he could be appointed a High Court Judge. Thirdly Art. 217(1) provided the procedure to be followed before a person was appointed a High Court Judge. That procedure was designed to test the fitness of a person to be appointed a High Court Judge: his character, his integrity, and his competence in various branches of the law, and the like. In recruiting a person from the Bar, his experience in different kinds of litigation would also be taken into account. The thing to note is that Art. 217 (1) provides for a once for all test of a person's fitness to be a High Court Judge. A person who has passed that test is subject to no other test of fitness but will continue to hold his office till he attains the age of retirement which had been fixed at 60 years till 1963. But once appointed, his performance on the Bench may be good, bad or indifferent. His judgments and orders may be subject to appeal in High Court, and are certainly subject to appeal to the Supreme Court under Art. 136 if not under other Articles of Chap. IV of part VI."

11. The appointment of a Judge is an executive function of the President. Article 217(1) prescribes the constitutional requirement of "consultation". Fitness of a person to be appointed a Judge of the High Court is evaluated in the consultation process (*see Basu's Commentary on the Constitution of India, Sixth Edition, p. 234)*. Once this dichotomy is kept in mind, then, it

becomes clear that evaluation of the worth and merit of a person is a matter entirely different from eligibility of a candidate for elevation. Article 217(2), therefore, prescribes a threshold limit or an entry point for a person to become qualified to be a High Court Judge whereas Article 217(1) provides for a procedure to be followed before a person could be appointed as a High Court Judge, which procedure is designed to test the fitness of a person to be so appointed: his character, his integrity, his competence, his knowledge and the like. Hence, Article 217(1) and Article 217(2) operate in different spheres. Article 217(1) answers the question as to who "should be elevated" whereas Article 217(2) deals with the question as to who "could be elevated". Enrolment of an advocate under the 1961 Act comes in the category of who "could be elevated" whereas the number of years of actual practice put in by a person, which is a significant factor, comes in the category as to who "should be elevated". One more aspect needs to be highlighted. "Eligibility" is an objective factor. Who could be elevated is specifically answered by Article 217(2). When "eligibility" is put in question, it could fall within the scope of judicial review. However, the question as to who should be elevated, which essentially involves the aspect of "suitability", stands excluded from the purview of judicial review. At this stage, we may highlight the fact that there is a vital difference between

judicial review and merit review. Consultation, as stated above, forms part of the procedure to test the fitness of a person to be appointed a High Court Judge under Article 217(1). Once there is consultation, the content of that consultation is beyond the scope of judicial review, though lack of effective consultation could fall within the scope of judicial review. This is the basic ratio of the judgment of the Constitutional Bench of this Court in the case of **Supreme Court Advocates-on-Record Association** (supra) and Re. **Special Reference No. 1 of 1998** (supra)

12. Lastly, it may also be stated that the present case arises from a writ petition filed under Article 226 of the Constitution by way of a writ of quo warranto and not a writ of certiorari.

Significance of Explanation (a) and Explanation (aa) inserted in Article 217(2) vide Forty-fourth Constitutional Amendment:

13. One of the questions which arises for determination before us is: whether by insertion of Explanation (aa) appended to Article 217(2)(b), the effect of judgment of this Court in **Prof. C.P. Agarwal's** case (supra) stands nullified?

14. To answer the above question, we need to refer to Article 124(3) (which has been quoted hereinabove). Article 124 deals with establishment

and Constitution of Supreme Court. Article 124(3) prescribes qualifications for appointment of a person as a Judge of the Supreme Court. Article 124(3)(b) inter alia states that a person shall not be qualified for appointment as a Judge of the Supreme Court unless he has been for at least 10 years an advocate of a High Court. This sub-clause has to be read with Explanation-II which is similar to Explanation (aa) appended to Article 217(2)(b). Commenting on Explanation-II, *H.M. Seervai in Constitutional Law of India, First Edition, p. 1012*, has this to say:

> "The qualification for appointment as a judge of the Supreme Court is the holding of a judge's office for at least five years in a High Court or in two or more High Courts in succession; or at least ten years' standing as an advocate of a High Court or two or more High Courts in succession; or distinction achieved as a jurist [Art. 124(3)]. In computing the period during which a person has been an advocate, any period during which he has held judicial office not inferior to that of a District Judge after he become an advocate, is to be included [Art. 124 (3) Expl. II]. It is clear that the explanation is not attracted if a person has been an advocate for ten years before accepting any judicial appointment, for that by itself is a sufficient qualification for appointment as a judge of the Supreme Court." (emphasis supplied)

15. In our view, Explanation (aa) appended to Article 217(2) is so appended so as to compute the period during which a person has been an advocate, any period during which he has held the Office of a Member of a

Tribunal after he became an advocate. As stated by the learned Author, quoted above, if a person has been an advocate for ten years before becoming a member of the Tribunal, Explanation (aa) would not be attracted because being an advocate for ten years *per se* would constitute sufficient qualification for appointment as a Judge of the High Court.

16. Before concluding on this point, we may state that the word "standing" connotes the years in which a person is entitled to practice and not the actual years put in by a person in practice (*see Halsbury's Laws of England, Fourth Edition Reissue, Volume 3(1), paragraphs 351 and 394 of the Chapter under the Heading 'Barristers'.*) Under Section 220(3)(a) of the Government of India Act, 1935, qualifications were prescribed for appointment as a Judge of a High Court. A Barrister of at least ten years standing was qualified to be appointed as a Judge of the High Court. As stated above, the word 'standing' connotes the years in which a person is entitled to practice, not the actual years put in by that person in practice. In **Re. Lily Isabel Thomas** reported in AIR 1964 SC 855 this Court equated "right to practice" with "entitlement to practice" (see para 11). In our view, Article 217(2)(b), therefore, prescribes a qualification for being appointed a Judge of the High Court. The concept of "actual practice" will fall under Article 217(1) whereas the concept of right to practice or entitlement to

practice will fall under Article 217(2)(b). The former will come in the category of "suitability, the latter will come in the category of "eligibility".

Meaning of the Expression "an Advocate of a High Court" in Article 217(2)(b):

17. The said expression was placed in the Constitution at a time when the practice of advocates was governed by the Indian Bar Councils Act, 1926. Section 2(1)(a) of that Act defined an "advocate" to mean "an advocate entered in the roll of advocates of a High Court under the provisions of the Act". Section 8 provided that "no person shall be entitled as of right to practise in any High Court, unless his name is entered in the roll of advocates of the High Court maintained under the Act." It is this enrolment which gave a right to practice or entitlement to practice.

18. The scope of the said 1926 Act has been succinctly spelt out in the judgment of the Allahabad High Court in the case of **Durgeshwar Dayal Seth v. Secretary, Bar Council** reported in AIR 1954 Allahabad 728 (vide paragraphs 4 and 5), which judgment stands approved by this Court in the case of **O. N. Mohindroo v. Bar Council of Delhi and ors.** reported in AIR 1968 SC 888. Paragraphs 4 and 5 of the judgment in **Durgeshwar's** case (supra) read as under:

"4. The Indian Bar Councils Act, 1926, was enacted by the Indian Legislature to provide for the constitution and incorporation of Bar Councils for certain courts. The Act extends to all the provinces of India. Under Section 1(2), it was made applicable to certain High Courts of Judicature including that at Allahabad and to such other High Courts within the meaning of Clause (24) of Section 3 of the General Clauses Act, 1897, as the Provincial Government by notification in the official gazette, declare to be High Courts to which this Act applies. Sections 1, 2, 17, 18 and 19 of the Act came into force at once and by Section 1(3) the Provincial Government was empowered by notification to direct that the other provisions of the Act would come into force in respect of any High Court to which the Act applies on such date as it may by the notification appoint.

The main provisions of the Act are as follows: Under Section 3 for every High Court a Bar Council would be constituted which was to be a body corporate, having perpetual succession. Section 8 lays down that

"no person shall be entitled as of right to practise in any High Court, unless his name is entered in the roll of the Advocates of the High Court maintained under this Act,"

and requires the High Court to prepare and maintain a roll of Advocates of the High Court. In the roll are to be entered the names of all persons who were, as Advocates etc., entitled as of right to practise in the High Court immediately before the date on which Section 8 comes into force, provided that they paid a fee, payable to the Bar Council, of Rs. 10/-. Also the names of all other persons who have been admitted to be Advocates of the High Court are to be entered in the roll on payment of such fee as may be prescribed. The High Court is required to send to the Bar Council a copy of the roll. This is also provided in Section 8.

> The Bar Council is authorised to make rules to regulate the admission of persons to be Advocates of the High Court, vide Section 9. The High Court is given the power by Section 10 to punish an Advocate for misconduct; the enquiry into the allegation of misconduct is to be made by a committee of the Bar Council. Every person whose name is entered in the roll of Advocates is entitled as of right to practise in the High Court of which he is an Advocate, vide Section 14. Power is given by Section 15 to a Bar Council to make rules in respect of the rights and duties of the Advocates of the High Court and their discipline and professional misconduct. When Ss. 8 to 16 are applied to any High Court, the Legal Practitioners Act of 1879 stands amended to the extent and in the manner specified in the schedule of the Act and if there is anything inconsistent with their provisions in the Letters Patent, they are deemed to have been repealed to that extent.
>
> **5.** On the passing of the above Act, the Provincial Government issued a notification under Section 1(3) applying the rest of the sections of the Act to the High Courts then existing, the High Court of Judicature at Allahabad (which will be referred to as the old High Court) and the Chief Court of Avadh and Bar Councils were established for them. The applicant got himself admitted as an Advocate on payment of the fee & his name was entered on the roll prepared by the old High Court of Allahabad. Under Section 14 he acquired the right to practise in the old High Court."

19. An interesting question on interpretation of Section 4 of Legal Practitioners Act, 1879 ("1879 Act" for short) came up for consideration before the Patna High Court in Re. **Devasaran Lall Sinha** reported in AIR 1946 Patna 369. The qualification for advocates, vakils and attorneys under

Section 4 required for an advocate who desired to appear in a Court subordinate to a High Court in which he was not enrolled that he should ordinarily be practicing in the Court in which he is enrolled. In 1941, the applicant had appeared for an examination held by the Bombay High Court, the passing of which entitled him to be enrolled as an advocate of that Court and to practice in that Court and in Courts subordinate to that Court. As a matter of fact, the applicant never practiced in the Bombay High Court or in the Courts subordinate to it. Since his enrolment as an advocate of the Bombay High Court he had practiced only in the District of Gaya in Bihar. This matter was brought to the notice of the High Court by the Registrar who pointed out to the High Court that the applicant was not enrolled as an advocate of the High Court. The applicant stated that he was entitled to practice as an advocate in Courts subordinate to the Patna High Court by placing reliance on Section 14(b) of the 1926 Act, which inter alia provided that an advocate shall be entitled as of right to practise in any other Court in British India and before any Tribunal authorised to take evidence. For that purpose, he placed reliance on the definition of the word "advocate" in Section 2(1)(a) of the 1926 Act, which inter alia defined an "advocate" to mean an advocate enrolled in the role of advocates of a High Court under the provisions of the 1926 Act. This contention of the applicant came to be

accepted by the Patna High Court vide para 4, which reads as under:

> "**4.** The only point remaining for consideration is whether there is any law in force which debars the applicant from the right to practise in Courts subordinate to this Court. The qualification for advocates, vakils and attorneys under Section 4, Legal Practitioners Act, 1879, requires for an advocate who wishes to appear in a Court subordinate to a High Court in which he was not enrolled that he should ordinarily be practising in the Court in which he is enrolled. As the applicant is admittedly not regularly practising in the Bombay High Court in which he is enrolled as an advocate, this section, had it stood by itself, would have been a bar to his practising as an advocate in Courts subordinate to this Court. But Section 38, Legal Practitioners Act, provides that nothing in that Act, except Section 36, shall apply to persons enrolled as advocates of any High Court under the Bar Councils Act, 1926. From this it is clear that the provisions of Section 4 of the Act do not apply to, and cannot operate to debar the applicant from practising in Courts subordinate to this Court as he is in fact an advocate of a High Court enrolled under the Bar Councils Act of 1926. Precisely the same point arose in Madras and was considered by a Full Bench of that Court in District Judge, Anantapur v. K.V. Vema Reddi. A.I.R. 1945 Mad. 144. The Full Bench held that Section 4, Legal Practitioners Act, has no application to advocates enrolled under the Bar Councils Act by any High Court, and that being so, Section 4 had to be ignored in the cases with which they were dealing which were cases of persons enrolled as advocates in the High Court at Bombay and claiming to be entitled to practise in Courts subordinate to the High Court at Madras as advocate by virtue of their enrolment as advocates by the Bombay High Court. These facts are indistinguishable from the facts of the present case, and with great respect, I can see no reason to differ from the view taken by the learned Judges who decided the Madras case. The letter of this Court from the Registrar referred to in the opening paragraph of this judgment

> must, therefore, be recalled and it must be declared that the applicant is entitled to practise as an advocate in the Courts subordinate to this High Court."
>
> (emphasis supplied)

20. The above judgment clearly indicates the meaning of the expression "an advocate of a High Court" in Article 217(2)(b). The important point to be noted is that though the applicant had never practiced in the Bombay High Court, where he was enrolled, the High Court held that the applicant could not be debarred from practicing in Courts subordinate to the Patna High Court as he was in fact an advocate of a High Court enrolled under Indian Bar Councils Act, 1926. In other words, entitlement or right to practice conferred on the applicant by his name being enrolled on the rolls of the Bombay High Court, where he had never practiced, prevented him from being debarred from practicing in the Courts subordinate to the Patna High Court. It is also important to note that the same view has been taken by the Full Bench of the Madras High Court in the case of **District Judge, Anantapur v. K.V. Vema Reddi and ors.** reported in AIR 1945 Madras 144.

21. At this stage, we may also refer to the provisions of the Advocates Act, 1961. The said 1961 Act provides for autonomous Bar Council in each State and also for All India Bar Council consisting mainly of the

representatives of the State Bar Councils. Under the 1961 Act, a State Bar Council has to enrol qualified persons as advocates and prepare a roll of advocates practicing in the State and thereafter a common roll of advocates for the whole of India is to be prepared by the Bar Council of India. The Advocates whose names are entered in the common roll would be entitled as of right to practice in all the courts in India including the Supreme Court. Under the 1961 Act, a State Bar Council has been empowered to enrol qualified persons as Advocates on its roll. The class of legal practitioners known as attorneys was abolished by Advocates (Amendment) Act, 1976 and the pre-existing attorneys were required to become Advocates under the 1961 Act, subject to their seniority under Section 17 of the Act. The scope of the 1961 Act came for consideration before this Court in the case of **O.N. Mohindroo** (supra). One of the points which arose for determination in that case related to legislative competence. This Court was required to consider the scope of Entries 77 and 78 of List I read with Entry 26 of List III of the Seventh Schedule to the Constitution. It was held that Entries 77 and 78 in List I apart from dealing with the constitution and organisation of the Supreme Court and the High Courts also dealt with persons entitled to practise before the Supreme Court and High Courts. It was held that, Entries 77 and 78 of List I so far as they related to the persons entitled to practice

before the Supreme Court and the High Courts are concerned, the power to legislate stood carved out from the general power relating to the provisions in Entry 26 of List III. It was held that the power to legislate in regard to persons entitled to practice before the Supreme Court and the High Courts is excluded from Entry 26 in List III and is made the exclusive field for Legislation by Parliament alone. The important point to be noted is that emphasis has been placed on the expression "entitled to practice" or "right to practice" in the Constitutional Scheme evidenced by not only the provisions of Article 217(2)(b) but also by the provisions contained in Article 145(1), Article 246 read with Entries 77 and 78 of List I and Entry 26 of List III of the Seventh Schedule to the Constitution. We quote hereinbelow paragraphs 8, 9, 10 and 11 of the judgment of this Court in the case of **O.N. Mohindroo** (supra), which read as under:

> "**8.** This being the scheme with regard to the constitution and organisation of courts and their jurisdiction and powers let us next proceed to examine entry 26 in List III. Entry 26, which is analogous to Item 16 in List III of the Seventh Schedule to the 1935 Act, deals with legal, medical and other professions but is not concerned with the constitution and organisation of courts or their jurisdiction and powers. These, as already stated, are dealt with by entries 77, 78 and 95 in List I, entries 3 and 65 in List II and entry 46 in List III. Enactments such as the Indian Medical Council Act, 1956, the Indian Nursing Council Act, 1947, the Dentists Act, 1948, the Chartered Accountants Act, 1949 and the Pharmacy Act, 1948, all Central Acts, would fall under the power to deal

with professions under entry 26 of List III in the Seventh Schedule to the Constitution and Item 16 of List III of 1935 Act. It will, however, be noticed that entries 77 and 78 in List I are composite entries and deal not only with the constitution and organisation of the Supreme Court and the High Courts but also with persons entitled to practise before the Supreme Court and the High Courts. The only difference between these two entries is that whereas the jurisdiction and powers of the Supreme Court are dealt with in entry 77, the jurisdiction and powers of the High Courts are dealt with not by entry 78 of List I but by other entries. Entries 77 and 78 in List I apart from dealing with the constitution and organisation of the Supreme Court and the High Courts also deal with persons entitled to practise before the Supreme Court and the High Courts. This part of the two entries shows that to the extent that the persons entitled to practise before the Supreme Court and the High Court are concerned, the power to legislate in regard to them is carved out from the general power relating to the professions in entry 26 in List III and is made the exclusive field for Parliament. The power to legislate in regard to persons entitled to practise before the Supreme Court and the High Courts is thus excluded from entry 26 in List III and is made the exclusive field for legislation by Parliament only [Re : Lily Isabel Thomas, AIR 1964 SC 555 and also Durgeshwar v. Secretary, Bar Council, Allahabad, AIR 1954 Allahabad 728]. Barring those entitled to practise in the Supreme Court and the High Courts, the power to legislate with respect to the rest of the practitioners would still seem to be retained under entry 26 of List III. To what extent the power to legislate in regard to the legal profession still remains within the field of entry 26 is not the question at present before us and therefore it is not necessary to go into it in this appeal.

9. The Advocates Act was passed to amend and consolidate the law relating to legal practitioners and to provide for the constitution of Bar Councils and an All India Bar. Section 2(a) and (i) define an 'advocate' and a

'legal practitioner'. Chapter II deals with the establishment of Bar Councils and their functions, viz., to admit persons on its roll, to prepare and maintain such roll, to entertain and determine cases of misconduct against advocates on its roll etc. Section 7 lays down the functions of the Bar Council of India, that is, to prepare and maintain a common roll of advocates, to lay down the standards of professional conduct and etiquette, to lay down procedure to be followed by its disciplinary committee and the disciplinary committee of each State Bar Council, to exercise general supervision and control over State Bar Councils etc. Chapter III deals with admission and enrolment of advocates. Section 16(1) provides that there shall be two classes of advocates, senior advocates and other advocates. Chapter IV deals with the right to practise. Section 29 provides that subject to the provisions of this Act and the rules made thereunder, there shall, as from the appointed day, be only one class of persons entitled to practise the profession of law, namely, the advocates. Section 30 provides that subject to the provisions of this Act, every advocate whose name is entered in the common roll shall be entitled as of right to practise throughout the territories to which this Act extends in all courts including the Supreme Court and before any tribunal or any other authority before whom such advocate is by or under any law for the time being in force entitled to practice. Chapter V deals with the conduct of advocates. Section 35 lays down that where on receipt of a complaint or otherwise a State Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee. The disciplinary committee has to fix a date for the hearing of the case and give a notice thereof to the advocate concerned and to the Advocate General of the State. Sub-sec. (3) provides that such committee after giving the advocate concerned and the Advocate General an opportunity of being heard, may make, inter alia, an order suspending the advocate from practice as it may deem fit. Similar powers are also

conferred on the Bar Council of India under s. 36 in relation to an advocate on the common roll. Section 37 gives a right of appeal to the Bar Council of India by any person aggrieved by an order of the disciplinary committee of a State Bar Council. Section 38 confers a right of appeal to the Supreme Court on any person aggrieved by an order by the disciplinary committee of the Bar Council of India under s. 36 or s. 37 and empowers the Supreme Court to pass such orders thereon as it deems fit.

10. The object of the Act is thus to constitute one common Bar for the whole country and to provide machinery for its regulated functioning. Since the Act sets up one Bar, autonomous in its character, the Bar Councils set up thereunder have been entrusted with the power to regulate the working of the profession and to prescribe rules of professional conduct and etiquette, and the power to punish those who commit breach of such rules. The power of punishment is entrusted to the disciplinary committees ensuring a trial of an advocate by his peers. Sections 35, 36 and 37 lay down the procedure for trying complaints, punishment and an appeal to the Bar Council of India from the orders passed by the State Bar Councils. As an additional remedy s. 38 provides a further appeal to the Supreme Court. Though the Act relates to the legal practitioners, in its pith and substance it is an enactment which concerns itself with the qualifications, enrolment, right to practise and discipline of the advocates. As provided by the Act once a person is enrolled by any one of the State Bar Councils, he becomes entitled to practise in all courts including the Supreme Court. As aforesaid, the Act creates one common Bar, all its members being of one class, namely, advocates. Since all those who have been enrolled have a right to practise in the Supreme Court and the High Courts, the Act is a piece of legislation which deals with persons entitled to practise before the Supreme Court and the High Courts. Therefore the Act must be held to fall within entries 77 and 78 of List I. As the power of

> legislation relating to those entitled to practise in the Supreme Court and the High Courts is carved out from the general power to legislate in relation to legal and other professions in entry 26 of List III, it is an error to say, as the High Court did, that the Act is a composite legislation partly falling under entries 77 and 78 of List I and partly under entry 26 of List III.
>
> **11.** In this view, the right of appeal to this Court under s.38 of the Act creates a jurisdiction and power in relation to a matter falling under entries 77 and 78 of the Union List and the Act would, therefore, fall under clause (1) and not clause (2) of Art. 138. The argument that s. 38 falls under Art. 138(2) and is invalid on account of its having been enacted without a special agreement with the State Government is, therefore, without merit."
>
> (emphasis supplied)

22. Apart from what is stated above, the judgment also emphasizes the fact that the 1961 Act inter alia provides that once a person is enrolled by any one of the State Bar Councils, he becomes entitled to practice in all Courts including Supreme Court. The 1961 Act creates one common Bar, all its members being of one class, namely, Advocates.

23. Thus, it becomes clear from the legal history of the 1879 Act, 1926 Act and 1961 Act that they all deal with a person's right to practice or entitlement to practice. The 1961 Act only seeks to create a common Bar consisting of one class of members, namely, Advocates. Therefore, in our view, the said expression "an advocate of a High Court" as understood, both,

pre and post 1961, referred to person(s) right to practice. Therefore, actual practice cannot be read into the qualification provision, namely, Article 217(2)(b). The legal implication of the 1961 Act is that any person whose name is enrolled on the State Bar Council would be regarded as "an advocate of the High Court". The substance of Article 217(2)(b) is that it prescribes an eligibility criteria based on "right to practice" and not actual practice.

24. The question still remains as to why in Article 217(2)(b) the Constitution makers have used the expression "an advocate <u>of a High Court</u>"?

25. Answer to the above query is given by *Basu's Commentary on the Constitution of India, sixth edition, page 236*, which reads as under:

> "**Cl.(2): Qualifications for appointment as High Court Judge.** The points to be noted, in comparison with the Government of India Act, 1935, are - (a) the exclusion of Barristers of the United Kingdom who are not advocates of a High Court of India within the meaning of sub-cl. (b); (b) the exclusion of members of the I.C.S. from post-Constitution appointments unless they satisfy cl. (2)(a).
>
> It is clear from cl. (2) that all appointments to the High Court Bench, made after commencement of the Constitution must go only to those who satisfy one of the two tests laid down in sub-cls. (a) and (b) of cl. (2)."

26. Under the 1926 Act, which Act was in force when the Constitution was framed, even a Barrister from United Kingdom was entitled to get himself enrolled as an advocate of a High Court. He had no right to practice in the High Court without getting himself enrolled. (see **Nihal Chand Shastri v. Dilawar Khan and Ors.** reported in AIR 1933 Allahabad 417).

27. We quote hereinbelow the relevant paragraphs from the judgment in **Nihal Chand** (supra), which read as follows:

> "…This Court under its powers conferred on it by the Letters Patent is entitled to enrol advocates for practising in this Court and Courts subordinate to it, vide Clause 7 which runs as follows:
>
> > "And we do hereby authorize and empower the said High Court of Judicature at Allahabad to approve, admit and enrol such and so many Advocates, Vakils and Attorneys as to the said High Court shall deem meet...."
>
> The High Court framed certain rules laying down the qualifications needed for enrolment of advocates. The rules now in force are to be found in Chap. 15 of the Rules of the Court. They are rules made by the Bar Council since the Bar Councils Act, came into force, and they have been approved by the High Court. Under Rule 1 of these rules:
>
> > "any Barrister of England...and any graduate of law of any University mentioned in the schedule, who in each case has further gone through a course of training for one

> year...may present an application for his admission to the roll of advocates of the Court."

The older rules more or less on similar lines. The rules and the Clause 7, Letters Patent, show that a Barrister of England as a Barrister has no right to practise in the High Court or in any Court subordinate to the High Court. Certain qualifications of different kinds are laid down for admission as advocates, and the fact that a candidate is a Barrister of England is one kind of qualification for enrolment. When a person who has taken the law degree of Allahabad University is enrolled as an advocate, he becomes as much an advocate of the Allahabad High Court as a Barrister of England. The Rules of the High Court make no distinction, between the two persons with different qualifications. Before the Bar Councils Act was passed and was acted upon, the Barristers from England were admitted on the roll of the High Court as advocate, while the Indian Graduates of law were admitted as vakils. Later on certain eminent vakils were given the status of advocates and, thereupon, they became as much advocates as Barristers from England enrolled in the Allahabad High Court. In all these cases the right of a Barrister to appear in the High Court or in the Courts subordinate to the High Court arose from his enrolment as an advocate and not otherwise.

Having been enrolled as an advocate, the Barrister or the Graduate at Law of the Indian University acquires certain privileges and the privilege is to appear, plead or act in any suit or appeal, vide Rule 10 of the High Court Rules in Chap. 15, p. 100. It is common ground that a barrister in England as such is not entitled to act. He can only plead. It follows from the Rules of the High Court of Allahabad that the disability of a Barrister-at-law to act in England disappears on his being enrolled as an advocate of the High Court. A Barrister-at-law in England not being entitled to act is not allowed to have a

> lien on any litigant's papers or money, but a Barrister, who is an advocate of the High Court of Allahabad, may have such a lien. This is recognized by Rule 14, Chap. 15, (p. 101) of the High Court Rules. Rule 15 of the same Chapter at p. 102, lays down that an Advocate (including a Barrister-Advocate) is entitled to appear, plead and act in any Court Subordinate to the High Court. In the province of Agra there are no Solicitors, and a Barrister-Advocate practising in the High Court or in any Subordinate Court is entitled to see his clients and to settle his fees. This he cannot do in England.
>
> From what has been said, it follows that the peculiar position of a Barrister-at-law in England disappears in the Province of Agra on his being admitted as an Advocate of the High Court. He combines in himself the capacities of a Barrister and Solicitor of England. He is as much subject to the disciplinary jurisdiction of the High Court as a non-Barrister-Advocate, while a Barrister of England while practising there is not an officer of the Court and in the case of misconduct, his case is referred to the Benchers of the Inn to which he belongs. In England a Barrister cannot act, cannot receive a client or receive instructions from him except through a Solicitor. But this disability does not exist in him in the Province of Agra, if he has been enrolled as an advocate." (emphasis supplied)

28. The point to be noted is that powers vested in the High Court by the Letters Patent the qualification prescribed for enrolment as an Advocate of the High Court was the law degree of Allahabad University or that the candidate is a Barrister of England. Similarly, under Section 220(3) of the Government of India Act, 1935 various categories of persons were qualified for appointment as a Judge of the High Court which included a Barrister, a

Member of Indian Civil Service etc.. To confine the qualification for appointment as a Judge of a High Court to only one instead of four categories mentioned in section 220(3), the Constitution framers have used only one consolidated expression, namely, "an advocate of a High Court". This expression finds place even in the 1961 Act, which has been enacted in order to consolidate various categories into one class, namely, Advocates [see judgment of this Court in **O.N. Mohindroo** (supra)]. It is for this reason that the Supreme Court in the case of **Prof. C.P. Agarwal** (supra) has observed vide paragraphs 6 and 9 as under:

> **"6.** Apart from this aspect, some of the earlier statutes bearing on the same subject have also used the very same or similar expression. The Legal Practitioners Act, 1879 defined by Section 3 a "Legal Practitioner" as meaning an Advocate, Vakil or Attorney of any High Court, a Pleader, Mukhtar or Revenue-agent. Section 4 of that Act provided:
>
> > "Every person now or hereafter entered as an Advocate or Vakil on the roll of any High Court under the Letters Patent constituting such Court, or under Section 41 of this Act, or enrolled as a pleader in the Chief Court of the Punjab under Section 8 of this Act, shall be entitled to practice in all the Courts subordinate to the Court on the roll of which he is entered----and any person so entered who ordinarily practices in the Court on the roll of which he is entered or some Court subordinate thereto shall, notwithstanding anything herein contained, be entitled, as such, to practice in any Court

> in the territories to which this Act extends other than a High Court on whose roll he is not entered, or, with the permission of the Court--in any High Court on whose roll he is not entered--."

Section 41 of the Act empowered a High Court to make rules as to the qualifications and admission of proper persons to be "Advocates of the Court" and subject to such rules to enrol such and so many Advocates as it thought fit. These provisions clearly show that advocates enrolled under Section 41 were enrolled as advocates of a High Court and were entitled, once enrolled, to practice either in the High Court or courts subordinate to such High Court or both. There was thus in the case of advocates so enrolled no distinction between those who practiced in the High Court and those who practiced in the courts subordinate to such High Court as they were entitled on enrolment, as aforesaid, to practice either in the High Court or in a court or courts subordinate thereto or both. The Indian Bar Councils Act, XXXVIII of 1926 also defined an 'advocate' meaning one "entered in the roll of advocates of a High Court under the provisions of this Act." Section 8 laid down that no person would be entitled as of right to practice in any High Court unless his name was entered in the roll of "the advocates of the High Court maintained under this Act." Under Section 8(2), the High Court was required to prepare and maintain "a roll of advocates of the High Court" in which should be entered the names of (a) all persons who were, as advocates, vakils or pleaders, entitled as of right to practice in the High Court immediately before the date on which this section came into force in respect thereof; and (b) all other persons who were admitted to be "advocates of the High Court" under this Act. Section 9 empowered the Bar Council to make rules to regulate the admission of persons to be "advocates of the High Court", and Section 10 gave power to the High Court in the manner therein provided to reprimand, suspend or remove from practice "any advocate of the High Court" whom it found

guilty of professional or other misconduct. Section 14(1) of the Act provided that an advocate, i.e., one whose name was entered under this Act in the roll of advocates of a High Court, shall be entitled as of right to practice in the High Court of which he is an advocate or in any other court save as otherwise provided by Sub-section 2 or by or under any other law for the time being in force. Once, therefore, the name of an advocate was entered in the roll of advocates of a High Court under one or the other Act, he was entitled to practice in the High Court and in courts subordinate thereto or in any other court subject of course to the provisions aforesaid. He was thus an advocate of the High Court irrespective of whether he practiced in the High Court or in the courts subordinate thereto, and as seen from Section 10 of the Bar Councils Act, he became amenable to the disciplinary jurisdiction of the High Court by reason of his being enrolled as an advocate of the High Court. The expression "an advocate of a High Court" must, therefore, mean, in the light of these provisions, an advocate whose name has been enrolled as an advocate of a High Court, no matter whether he practiced in the High Court itself or in courts subordinate to it or both. The expression "an advocate or a pleader of a High Court" having thus acquired the meaning as aforesaid, it must be presumed that a similar expression, namely "a pleader of a High Court for a period of not less than ten years" was used in the same sense in Section 101(3)(d) of the Government of India Act, 1915, when that section laid down the qualifications for the office of a Judge of a High Court in the case of a pleader. The same phraseology was also repeated in Section 220(3)(d) of the Government of India Act, 1935, except for one change, namely, that in calculating 10 years' standing, his standing as a pleader of 2 or more High Courts in succession was also to be included.

…

9. Counsel next relied on Article 233(2) in support of the construction suggested by him of Article 217(2)(b) and pointed out that wherever the Constitution did not wish to

> insist on an appointee having been an advocate practising in a High Court, it has used a different expression, namely, an advocate simpliciter, as in Article 233(2). Article 233 deals with appointment of district judges and Clause 2 thereof provides that a person not already in the service of the Union or the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment. It is true that in this clause the word "advocate" is used without the qualifying words "of a High Court". It is difficult, however, to see how the fact that the word "advocate" only used in connection with the appointment of a district judge would assist counsel in the construction suggested by him of the expression "advocate of any High Court" in Article 217, or that that expression must mean an advocate who has had the necessary number of years' practice in the High Court itself. The distinction, if any, between the words "an advocate" in Article 233(2) and the words "an advocate of a High Court" in Article 217(2)(b) has no significance in any event after the coming into force of the Advocates Act, 1961, as by virtue of Section 16 of that Act there are now only two classes of persons entitled to practice, namely, senior advocates and other advocates."
>
> (emphasis supplied)

29. To complete our discussion, we may also mention that the expression "two or more such courts in succession" in Article 217(2)(b) is not of any real relevance. Prior to the 1961 Act, when a person was an advocate enrolled in a High Court, the words "in succession" suggested that a person enrolled in more than one High Court could not multiply his years of enrolment by the number of courts in which he stood enrolled. For example,

a person enrolled for five years in two High Courts simultaneously would not be an advocate of ten years standing. If he was enrolled in more than one court in succession only then would this be satisfied.

Justiciability of appointments under Article 217(1):

> *"The overarching constitutional justification for judicial review, the vindication of the rule of law, remains constant, but mechanism for giving effect to that justification vary".*
>
> ***…Mark Elliott***

> *"Judicial review must ultimately be justified by constitutional principle."*
>
> ***…Jowett***

30. In this case, we are concerned with the mechanism for giving effect to the Constitutional justification for judicial review. As stated above, "eligibility" is a matter of fact whereas "suitability" is a matter of opinion. In cases involving lack of "eligibility" writ of quo warranto would certainly lie. One reason being that "eligibility" is not a matter of subjectivity. However, "suitability" or "fitness" of a person to be appointed a High Court Judge: his character, his integrity, his competence and the like are matters of opinion.

31. Appointment under Article 217(1), vis-à-vis qualification under Article 217(2), is the function of participatory integrated process in which there is deliberation and consultation between the Supreme Court Collegium

and the High Court Collegium. In cases of consensus, the question of primacy does not arise. The Supreme Court Collegium does not sit in appeal over the recommendations of the High Court Collegium. The concept of plurality of Judges in the formation of the opinion of the CJI is one of inbuilt checks against the likelihood of arbitrariness or bias. At this stage, we reiterate that 'lack of eligibility" as also "lack of effective consultation" would certainly fall in the realm of judicial review. However, when we are earmarking a joint venture process as a participatory consultative process, the primary aim of which is to reach an agreed decision, one cannot term the Supreme Court Collegium as superior to High Court Collegium. The Supreme Court Collegium does not sit in appeal over the recommendation of the High Court Collegium. Each Collegium constitutes a participant in the participatory consultative process. The concept of primacy and plurality is in effect primacy of the opinion of the Chief Justice of India formed collectively. The discharge of the assigned role by each functionary helps to transcend the concept of primacy between them. It is important to note that each constitutional functionary involved in the participatory consultative process is given the task of discharging a participatory constitutional function, there is no question of hierarchy between these constitutional functionaries. Ultimately, the object of reading such participatory

consultative process into the Constitutional scheme is to limit judicial review restricting it to specified areas by introducing a judicial process in making of appointment(s) to the higher judiciary. These are the norms, apart from modalities, laid down in the case of **Supreme Court Advocates-on-Record Association** (supra) and also in the judgment in Re. **Special Reference No. 1 of 1998** (supra). Consequently, judicial review lies only in two cases, namely, "lack of eligibility" and "lack of effective consultation". It will not lie on the content of consultation.

Application of Principles enumerated above to the facts of the Present Case:

32. Having spelt out the dichotomy between appointment on the basis of fitness/suitability under Article 217(1) vis-à-vis qualifications under Article 217(2), we are of the view that respondent no. 3 herein satisfies the qualifications prescribed under Article 217(2)(b). For this purpose, we are reading Section 217(2)(b) with Explanation (aa). Respondent No. 3 has worked as a Member of ITAT between the period 3.12.1997 and 6.8.2008 (11 years). Prior thereto, he has worked as Additional Law Officer (Director), Law Commission of India. He was admittedly enrolled as an Advocate of the High Court on 13.9.1975. Applying the principles enumerated hereinabove, both, with regard to entitlement to practice and

computability of the period during which respondent no. 3 has worked in ITAT, he stood qualified for appointment as a Judge of the Allahabad High Court. Therefore, this case does not suffer from the vice of lack of eligibility. As stated above, in this case, the matter has arisen from the writ of quo warranto and not from the writ of certiorari. The bio-data of respondent no. 3 was placed before the Collegiums. Whether respondent no. 3 was "suitable" to be appointed a High Court judge or whether he satisfied the fitness test as enumerated hereinabove is beyond justiciability as far as the present proceedings are concerned. We have decided this matter strictly on the basis of the Constitutional scheme in the matter of Appointments of High Court Judges as laid down in the **Supreme Court Advocates-on-Record Association** (supra) and in Re. **Special Reference No. 1 of 1998** (supra). Essentially, having worked as a Member of the Tribunal for 11 years, respondent no. 3 satisfies the "eligibility qualification" in Article 217(2)(b) read with Explanation (aa).

33. One of the submissions advanced before us on behalf of the Original Petitioner was that consultation by members of the two Collegiums was on the basis of the performance of respondent no. 3 as a member of ITAT, the source of appointment being from "service". It was urged that there was no consultation regarding respondent no. 3 under Article 217(2)(b). It was

urged that if the performance of respondent no. 3 during the period he was holding the office of the Member of ITAT was the subject matter of consultation, then, it cannot be said to be a consultation at all as there has not been any consultation regarding respondent no. 3 under Article 217(2)(b). In other words, the contention before us was that since respondent no. 3 was shown as a service Judge, he should have been considered under Article 217(2)(a). This argument advanced on behalf of the Original Petitioner is misconceived. The very purpose for enactment of Article 217(2)(a) and Article 217(2)(b) is to provide for a mix of those from the Bar and those from Service who has the past experience of working as judicial officers/officers in Tribunals. This was the object behind a policy decision taken in the Chief Justices' Conference of 2002. The object of adding Explanation (aa) is to complement Explanation (a) appended to Article 217(2) and, together, they have liberalised the source of recruitment for appointment to the High Court. Therefore, for eligibility purposes clause (aa) of the Explanation read with sub-clause (b) of clause (2) of Article 217 would apply to Members of ITAT, in the matter of computation of the prescribed period for an advocate to be eligible for being appointed as a High Court Judge. This aspect of "eligibility" has nothing to do with "suitability".

34. Coming to the question of consultation, it has been submitted on behalf of the Original Petitioner that there has been lack of effective consultation, particularly when "reliable information" supplied by the three Judges Sub-committee appointed to examine the quality of judgments rendered by respondent no. 3 stood withheld from the Supreme Court Collegium. According to the Original Petitioner, the Chief justice of the Allahabad High Court had appointed a three Judges Sub-committee to examine the quality of judgments of the persons coming under the zone of consideration from "service" quota and, therefore, if the Sub-committee gave adverse comments about the reputation of respondent no. 3 in the course of his working as a Member of ITAT and the Chief Justice of the Allahabad High Court fails to forward that information to the Supreme Court Collegium, it would certainly constitute a ground for judicial review based on lack of effective consultation. In this connection, reliance has been placed on paragraphs 29 to 32 of the judgment in Re. **Special Reference No. 1 of 1998,** which read as under:

> "**29.** The majority judgment in the *Second Judges case, (1993) 4 SCC 441* requires the Chief Justice of a High Court to consult his two seniormost puisne Judges before recommending a name for appointment to the High Court. In forming his opinion in relation to such appointment, the Chief Justice of India is expected

> "to take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court. The Chief Justice of India may also ascertain the views of one or more senior Judges of that High Court...."

The Chief Justice of India should, therefore, form his opinion in regard to a person to be recommended for appointment to a High Court in the same manner as he forms it in regard to a recommendation for appointment to the Supreme Court, that is to say, in consultation with his seniormost puisne Judges. They would in making their decision take into account the opinion of the Chief Justice of the High Court which "would be entitled to the greatest weight", the views of other Judges of the High Court who may have been consulted and the views of colleagues on the Supreme Court Bench "who are conversant with the affairs of the High Court concerned". Into that last category would fall Judges of the Supreme Court who were puisne Judges of the High Court or Chief Justices thereof, and it is of no consequence that the High Court is not their parent High Court and they were transferred there. The objective being to gain reliable information about the proposed appointee, such Supreme Court Judge as may be in a position to give it should be asked to do so. All these views should be expressed in writing and conveyed to the Government of India along with the recommendation.

30. Having regard to the fact that information about a proposed appointee to a High Court would best come from the Chief Justice and Judges of that High Court and from Supreme Court Judges conversant with it, we are not persuaded to alter the strength of the decision-making collegium's size; where appointments to the High Courts are concerned, it should remain as it is, constituted of the

Chief Justice of India and the two seniormost puisne Judges of the Supreme Court.

31. In the context of the judicial review of appointments, the majority judgment in the *Second Judges* case said: (SCC pp. 707-08, para 480)

> "Plurality of Judges in the formation of the opinion of the Chief Justice of India, as indicated, is another inbuilt check against the likelihood of arbitrariness or bias.... The judicial element being predominant in the case of appointments ..., as indicated, the need for further judicial review, as in other executive actions, is eliminated."

The judgment added: (SCC p.708, para 482)

> "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, ... these matters are not justiciable on any other ground...."

32. Judicial review in the case of an appointment or a recommended appointment, to the Supreme Court or a High Court is, therefore, available if the recommendation concerned is not a decision of the Chief Justice of India and his seniormost colleagues, which is constitutionally requisite. They number four in the case of a recommendation for appointment to the Supreme Court and two in the case of a recommendation for appointment to a High Court. Judicial review is also available if, in making the decision, the views of the seniormost Supreme Court Judge who comes from the High Court of the proposed appointee to the Supreme Court have not been taken into account. Similarly, if in connection with an appointment or a recommended appointment to a High

> Court, the views of the Chief Justice and senior Judges of the High Court, as aforestated, and of Supreme Court Judges knowledgeable about that High Court have not been sought or considered by the Chief Justice of India and his two seniormost puisne Judges, judicial review is available. Judicial review is also available when the appointee is found to lack eligibility."
>
> (emphasis supplied)

35. We find no merit in the above submissions. Apart from legal niceties, on facts, we find on meticulous scrutiny of the confidential files that the content of the Report submitted by the Sub-committee containing information regarding the lack of actual practice as an Advocate of the High Court and the working of respondent no. 3 as a Member of ITAT during his nascent years in office was before the Supreme Court Collegium, albeit from a different channel. In fact, the information contained in the Report of the Sub-committee was also brought to the notice of the Supreme Court Collegium, though through a different route. Further, that information was meticulously vetted and the recommendation of the High Court Collegium for appointment was sent back by the Supreme Court Collegium to the High Court Collegium for reconsideration. The matter was re-examined by the High Court Collegium. That Collegium reiterated its position and it recommended once again the name of respondent no. 3 for appointment as a High Court Judge. On facts, we hold, that there was effective consultation.

Since the consultation process stood complied with, its content was not amenable to judicial review (see para 32, quoted hereinabove, of the judgment in Re. **Special Reference No. 1 of 1998).**

36. Before concluding, we may state that "continuity of an Institution" is an important Constitutional principle in the Institutional decision-making process which needs to be insulated from opinionated views based on misinformation. At the end of the day "trust" in the decision-making process is an important element in the process of appointment of Judges to the Supreme Court and the High Court, which, as stated above, is the function of an integrated participatory consultative process. We are constrained to make this remark in view of, to say the least, baseless allegations made in the supplementary affidavit dated 15.4.2009 against institutional decision making process.

37. For reasons given hereinabove, Transferred Case (C) No. 6 of 2009 stands dismissed.

……J.
(S.H. Kapadia)

……J.
(Aftab Alam)

New Delhi;
July 6, 2009.