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President refers judges appointment law to SC

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NEW DELHI, July 27: Confrontation is brewing between the executive and the judiciary over the primacy of the Chief Justice of India in the appointment and transfer of judges. President K R Narayanan made a reference to the Supreme Court today on interpretation of law on the subject.

Recently, the Government had asked the Chief Justice of India, Justice M M Punchhi, to reconsider some of his transfer proposals on the grounds that they had violated norms. Justice Punchhi is said to have declined saying that he had followed the procedure as laid down in the Constitution.

Saying that a public controversy was undesirable given that "principles and institutions" were involved, Attorney General Soli Sorabjee submitted a copy of the reference, made under Article 143 (1) of the Constitution, to a division bench of Justice S Saghir Ahmad and Justice K T Thomas. This bench is hearing two petitions on appointment of judges.

The four-page reference said: "Doubts have arisen about interpretation of the law laid down by the Supreme Court and it is in public interest that the said doubts relating to the appointment and transfer of judges be resolved."

The court today directed that the reference be put up before the Chief Justice for appropriate orders while deferring the hearing on the petitions after issuing notices to the AG, Union of India and the Law Ministry returnable by September 14.

One of the petitions that was to be heard today seeks a direction for appointment of judges in the Allahabad High Court whereas the other seeks a direction to the Government to appoint judges as per the recommendations made by Chief Justice M M Punchhi.

The President has referred nine questions to the court for consideration and sought its opinion in the context of the 1993 S.C. Advocates-on-Record Assn vs Union of India case which "has laid down the principles and prescribed procedural norms in regard to the appointment of Supreme Court judges, Chief Justices and judges of the high court and transfer of judges from one high court to another." Almost all of the points of Presidential Reference refer to the various aspects of the "consultative process" laid down in the judgment for making appointments and transfer such as, whether the recommendations

made by the CJI are binding even if violative of the consultative norms; whether the consultation is to be in writing and the number of judges to be consulted.

During the hearing, the Attorney General said that even the effect of the reference on the two petitions could only be decided after a Constitution bench was set up.

Criticising the government for delaying the matter concerning appointment of judges and Chief Justices in various high courts, the bench pointed to the strike by the Rajasthan Bar Council over non-appointment of the Chief Justice in the High Court and asked the Attorney General as to the steps taken by the government to fill nearly 30 vacancies in the Allahabad High Court even after the CJI had given his concurrence to the recommendations made by the Chief Justice of the High Court.

Sorabjee said steps were being taken with regard to appointing judges in the high court but there was a discrepancy in the recommendations made in respect of appointments to be made.

He said some names were missing from the recommendation of the present Chief Justice which were earlier suggested by the previous Chief Justice. The Attorney General said the precise reason behind the Presidential reference was the undesirability of a public controversy as "we are dealing with principles and institutions."

While stating that there was no question of questioning the recommendatory power of CJI as regard to appointments and transfer of judges were concerned, Sorabjee however submitted that there was no point in dealing with the matter piecemeal and a Constitution bench should decide the questions involving larger issues relating to appointment and transfer of judges.

The president's nine questions

? Does the expression "consultation with the Chief Justice of India" mean consultation with a plurality of judges or does the individual opinion of the Chief Justice of India constitute consultation?

? Is the transfer of judges judicially reviewable?

? Does the CJI require to consult only the two seniormost judges or whether there should be wider consultation?

? Is the CJI entitled to act in his individual capacity in cases where the Government conveys material to him against the appointment of a judge recommended by him?

? Should consultation be only with those judges who have the High Court concerned as a parent High Court or also with those who had served there on transfer from their parent or any other court?

? Does a "strong cogent reason" have to be recorded to justify supersession of judges in recommending appointments?

? Should the opinion of the CJI with that of consulted judges be sent to the Government in writing?

- ? Is the CJI obliged to comply with the norms and the requirement of the consultation process in making his recommendations?
- ? Are the recommendations made without any consultation binding on the government?

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