

# Law and Other Things

*A Blog About Indian Law, the Courts, and the Constitution*

<http://lawandotherthings.blogspot.com/2009/08/appointing-independent-high-court.html>

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## Appointing "Independent" High Court Judges

In a post on [SpicyIP](#), I reviewed a big ticket compulsory licensing dispute involving the sound recording industry on the one hand, and radio stations on the other. I went on to reflect on the competence of the current Copyright Board that is adjudicating this highly complex dispute. And asked if the Chairman of the Copyright Board, Dr Raghbir Singh was sufficiently qualified to merit his post.

The Copyright Act requires that the post of Chairman be occupied by a person who is qualified to be a High Court judge. Preliminary investigation led me to Dr Singh's CV, which does not carry any prima facie evidence of him having been an advocate of the High Court for at least ten years.

### **As many of you know, Article 217 (2) of the Constitution requires that:**

"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;"

Dr Singh, a PhD in law has had a very distinguished legal career including the following appointments:

1. Indian Legal Service of the Government of India as Parliamentary Counsel/legislative draftsman (September, 1980 – March, 2000)
2. Joint Secretary & Legislative Counsel (21.08.1991 to 20.08.1996) and Additional Secretary (21.08.1991 to 31.12.1997) in the Indian Legal Service in the Legislative Department, Ministry of Law, Justice and Company Affairs, New Delhi.
3. Secretary , Legislative Department, Ministry of Law, Justice and Company Affairs, New Delhi (01.01.1998 – 31.03.2000). 4. Secretary, National Commission to Review, the Working of the Constitution, New Delhi (01.04.2000 to 30.04.2002).

Impressive though they may be, do the above appointments qualify as "judicial offices" within the meaning of the Constitution? No, says the Supreme Court of India in **Sri Kumar Padma Prasad v Union of India : (1992) 2 SCC 428**, an important case concerning the validity of appointment of a certain Mr Srivastava to the Gauhati High Court.

The court effectively ruled that any post that is effectively controlled by the Executive (such as the post of Legal Remembrancer-Cum-Secretary, Law & Judicial, held by Mr Srivastava) could never qualify as a "judicial office" within the meaning of Article 217. In pertinent part, the court also endorsed the ruling in Chandramohan that although our Constitution does not envisage a strict separation of powers doctrine, it clearly advocates an independent judiciary: in fact such independence forms part of the basic structure of the Constitution.

### **Meaning of "Judicial Office"**

I reproduce some extracts from the court that may be of interest to our readers:

"We are of the view that holder of "judicial office" under Article [217\(2\)\(a\)](#) means the person who exercises only judicial functions, determines causes inter-parts and renders decisions in a judicial capacity. He must belong to the judicial service which as a class is free from executive-control and is disciplined to uphold the dignity, integrity and independence of judiciary.

....It is clear that the expression "judicial office" under Article [217\(2\)\(a\)](#) of the Constitution has to be interpreted in consonance with the scheme of Chapter V and VI of Part VI of the Constitution. We, therefore, hold that expression "judicial office" under Article [217\(2\)\(a\)](#) of the Constitution means a "judicial office" which belongs to the judicial service as defined under Article [236\(b\)](#) of the Constitution of India. In order to qualify for appointment as a Judge of a High Court under Article [217\(2\)\(a\)](#) a person must hold a "judicial office" which must be a part of the judicial service of the State.

....It is for the first time in the post-independent era that this Court is seized of a situation where it has to perform the painful duty of determining the eligibility of a person who has been appointed a Judge of High Court by the President of India and who is awaiting to enter upon his office. We looked into the official record and permitted learned Counsel for the parties to examine the same. We are at a loss to understand as to how the bio-data of Srivastava escaped the scrutiny of the authorities during the process of consultation under Article [217\(1\)](#) of the Constitution of India. A cursory look at the bio-data would have disclosed that Srivastava was not qualified for appointment as a Judge of the High Court on the admitted facts which have been on the official files all the time.

Needless to say that the independence, efficiency and integrity of the judiciary can only be maintained by selecting the best persons in accordance with the procedure provided under the Constitution. These objectives enshrined under the Constitution of India cannot be achieved unless the functionaries accountable for making appointments act with meticulous care and utmost responsibility.

The independence of judiciary is part of the basic structure of the Constitution. The Directive Principles give a mandate that the State shall take steps to separate the judiciary from the executive which means that there shall be a separate judicial service free from the executive control. The Constitution scheme, therefore, only permit members of the judicial service as constituted in terms of Article [236\(b\)](#) of the Constitution to be considered for the post of district judge and that of the High Court Judge."

### **Applying Padma Prasad to the Copyright Board Case**

Coming back to the Copyright Board matter, it is clear that Dr Singh has never held a "judicial office" for the purpose of Article 217(2), as almost all of his appointments were under the control of the Executive. He does not therefore qualify to be a High Court judge and thereby, is not fit to sit as Chairman of the Copyright Board. Of course, this takes his current bio-data at face value and assumes that he has never been an advocate for ten years or more.

If the above holds true, the government ought to immediately review the situation and take steps to replace Dr Singh as Chairman. Else, these compulsory licensing proceedings, which are the first of their kind in India are susceptible to vitiation at a later stage. Clearly, more billing hours for the lawyers. But a sheer drag on the justice machinery in our country and a tremendous waste of resources for litigants who continue to operate in a climate of legal uncertainty.



Posted by Shamnad Basheer at [10:26 PM](#)