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**CASE COMMENTARY ON ‘SUPREME COURT ADVOCATES ON
RECORD ASSOCIATION VS UNION OF INDIA’**- Baishnabi Rout¹**ABSTRACT**

The four Judges cases concerning on judiciary system focuses mainly on the basics of judiciary system. Starting from questions related to transparency to different procedure related to appointment and transfer, there are many writ petition filled to answer these questions. In addition, through cases like S.P Gupta vs Union of India, 1981; Supreme Court Advocates On Record Association VS Union of India, 1993 and 2015, it clearly shows the importance of separation of power and the stand of executive in judicial decision making. These all points revolve around the process the judicial system as well as court went through to give rise an efficient collegium system. So, that it can take appropriate decisions with respect to appointment and transfer of SC and HC Judges. The objective of this research is: Brief about Judiciary and Advocate on-record; Discuss how different writ petitions were filed to shape judicial system; Basic issues raised in these cases leading to landmark changes in judiciary's collegium system.

INTRODUCTION:

The lawsuit '*SUPREME COURT ADVOCATES ON RECORD ASSOCIATION VS UNION OF INDIA*' 1993 determines power separation within the different wings of Government and entitles Judiciary as one of the primary wing that is the fundamental component of the Constitution. The "Second Judges Case" is a well-known name for this case. It's "Advocate-On-Record" case which follows the provisions laid down in Order IV of the Supreme Court of India Rules, 1966. So, one advocate will represent the whole case under Article 145 of the Constitution. However, if court needs, it calls for more than one advocate on record to appear and plead.

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The case was determined on October 6, 1993, in order to protect the "Rule of Law," which is crucial part to carry on democratic system in a nation and the power separation within bodies. This is enshrined in the basic booklet of laws and rules called "Constitution". In addition, the government follows the principle of "Separation of judicial from the executive" to ensure full-fledged democracy.

Following its judgement, the collegium method was used to appoint Supreme Court and High Court judges. Nine judges looked into this case to clear out two most crucial question:

1. The position of India's Chief Justice and position as well as relationship between Judiciary and Executive system of India.
2. The justifiability of the judge's strength fixation

SUMMARY OF FACTS:

"SUPREME COURT ADVOCATES ON RECORD ASSOCIATION VS UNION OF INDIA"

- This case is also popularly known as the 'second judges bench'. It talks about establishing judiciary system as an independent body. This marks as one of the basic structures of the constitution. The 13-judge bench in the Keshavananda Bharthi case ruled that the basic structure of the constitution cannot be amended. However, in that judgment, the Court did not set a proper boundary and demark the basic structure. In the subsequent judgments, this term was properly defined. Therefore, this case decides upon the independence of different bodies especially the judiciary. It is an essential part of the basic structure of the constitution.

This judgement talked about Supreme Court and High Court Judges appointment and the stand of the executive in the interference in the judicial matter. After this judgment clarity was given about the appointment of judges by adopting a collegium system. The main aim of the nine-judge bench was to protect the integrity and independence of the judiciary from the executive's power. For that reason, the Chief Justice position needs to make superior.

The nine-judge bench sat to overrule S.P. Gupta's case. Before this judgement, it was the responsibility of the government to fill the vacancies in the judiciary. It was only after 1993 that the Chief Justice of India got the supreme authority to fill the vacancies and he was to work along with two other senior-most judges of the Supreme Court.

The questions raised in the above case were answered in the **Sankal Chand v/s Union of India** case. In this case, the Court upheld the transfer of the Chief Justice of Himachal Pradesh. Nonetheless, by 1982, the discussion had arrived at a stunning magnitude. These issues took

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strong structure in a cluster of writ petitions scrutinizing the transfer to move the judges. It tested the impacted exchange of certain judges and requesting the legitimacy of judge strength. The issues started surfacing in 1981 itself when numerous writ petitions were filed by various lawyers, even practitioners in different states regarding the interference of Government in non-appointment and transfer of two Chief Justices. At the same time, the constitutionality of the procedure of SC and HC judges' appointment was questioned. The petitioners also requested to convert the additional judges' seats into the permanent judiciary.

S.P Gupta v/s Union of India, 1981 case is also known as the 'First Judges case' out of the Four Judges cases which played an important role in the formation of the collegiums system. This case led to establishment of the collegiums system whereas the 'Second Judges case' made proper steps to make this system more developed. The 'Third Judges case' advanced the system to another level by answering the loopholes in the system and finally the 'Fourth Judges case' abolished the National Judicial Appointment Commission that gave the President in the selection of judges for the Supreme Court and High Court. This was to be established by a bill introduced in the Parliament though it lapsed after the dissolution of the 9th Lok Sabha as the Constituent (67th Amendment) Bill, 1990. The objective of introducing this bill was to successfully implement the "121st Law Commission Report."

LEGAL ISSUES:

The given case solved two major legal issues as follows:

1. Whether the opinion of the Chief Justice of India should be held final and supreme in cases related to the Supreme Court and High Courts' judges' appointment and their transfer?

The first issue was with distinction of terms 'CONSULTATION' and 'CONCURRENCE'. The term 'consultation' which meant that the decision of appointment of judges must be with integration, participatory and consultative process? The practice of appointments should not mean the formation of conventions. In many cases registered in the Courts, the government is a party to it so it cannot involve in the procedure of appointment of judges. It was held that India's Chief Justice (CJI) is the 'Pater Familias' and would be in the best position to decide upon the appointments.

Regarding the appointment of a Judge as the "Chief Justice of India", the majority held that the seniority provision would prevail, provided of course that the person should be fit for the question. It is the duty of CJI to initiate the proposal for the appointment of Judges. So,

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judges of the Supreme Court and the High Courts are initiated by CJI which would be guided by two other senior-most judges. Furthermore, the legitimate expectation of elevation should also be kept in mind.

Regarding the transfer, the consent of the transferee is immaterial. But the personal factors should be considered as held in the SP Gupta case. Justifiability is not possible in this case except on the ground that the recommendation was not made by the CJI.

2. Whether the fixation on the strength of the Judges in each High Court is justiciable?

It is not justiciable but it should be remembered that the fewer the number of judges the more time the judiciary will take to solve the pending cases under Article 21 it is also a fundamental right to have a speedy trial in Courts.

IDENTIFICATION OF PARTIES:

Petitioner: Supreme Court Advocates on Record Association

Respondent: Union of India

The contention of the Parties:

Petitioner:

The contentions presented by the petitioner's counsel are:

1. That by the executive taking part in the procedure of judges' appointed making judiciary connected to executive. Somehow, it shows executives' power over judiciary and challenging power separation between the wings of Government.
2. When the matter concerns about judiciary, the decisions and opinions sought by the Chief Justice of India should be full and final.
3. The Central Government being party to various cases registered in the court it cannot involve in the procedure of judges' appointment.
4. The transfer of judges should be exclusively in the hands of the Chief Justice of India.
5. There is a need to increase in the number of judges.
6. The basic structure of the constitution which is the independence of the judiciary should be maintained.

Respondent:

The contentions presented by the respondent's counsel are:

1. The Executive has never made any appointment to the superior judiciary without

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referring it to the Chief Justice of India.

2. While taking any decision of transfer or appointment, the opinion of the Chief of Justice is held primary and is respected.

SUMMARY OF ARGUMENTS ADVANCED:

- **Petitioners -**

1. According to Article 50 of the Constitution, the executive and judicial branches of government must be kept as far apart as possible from one another. As a result, the executive's advantage in the appointment process is a blatant breach of Article 50.
2. The executive branch's influence in judicial appointments must be kept to a minimum, and the CJI's proposal must not be disregarded. The CJI is no longer an active participant in the appointment process due to this power of disobedience with the President.
3. The Chief Justice of India's apathetic and meek demeanour has proven detrimental to the independence of the judiciary.
4. For free and fair appointment procedure and administration system, executive and judiciary need to be totally independent from each other. Executive supremacy would give rise to political biasness and favouritism.
5. The word "consultation" is equal to "concurrence".

- **Respondents –**

1. According to Articles 124 and 214 of the Constitution, the president, who serves as the nation's executive leader, has the authority to appoint judges to the Supreme Court and High Court on the recommendation of the Cabinet Ministers.
2. Executive's disagreement with the CJI's opinions does not diminish the judiciary's independence. The President now has more discretion in the appointment process according to the Constitution itself. The Chief Justice's sole responsibility is to inform the President of information about the potential nominee that is unknown to him. However, the executive has more power to take action than the CJI, who is only a consultant in the process.
3. The judges' salaries, benefits, and allowances are set by the Constitution, and the Parliament is not even allowed to reduce the amount of these payments through a single law. Moreover, the tenure is also decided by Constitution. So, we can say that

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Constitution provisions itself assure the independency of the judiciary from executive. Hence, federal system still prevails.

SUMMARY OF JUDGEMENT

- The whole case of 'SUPREME COURT ADVOCATES ON RECORD ASSOCIATION VS UNION OF INDIA' revolves around judiciary and executive system of India.
- In this case, the tug of war between Executive and Judiciary overruled the S.P. Gupta v. UOI case. It gave rise to new concept which said the political term consultation is equal to concurrence. Hence, the crux of the case pointed out that if Chief Justice of India will make any decision, then, President have to abide by it and CJI has the final say. In simple words, judiciary was given a higher position and more power than executive.
- The whole power of appointment of judges in both Supreme Court and High Court got dominated by CJI's decision while President had sign for appointment accordingly.
- Regarding the issue of primacy, the court comes to the conclusion that the Chief Justice of India has a primal, unique, and singular role in the selection of Supreme Court judges. However, he also participates in the process in cooperation with the Executive, and neither he nor the Executive can make an appointment against the other's wishes.
- It emphasis on "protecting the integrity and guarding the independence of the judiciary." So, it concentrates on federal system and separation of powers. Thus, CJI is kept as an essential part in appointing the judges of India.
- The important matters relating to appointment of judges to the Supreme Court or High Court and the transfer of High Court Judges or Chief Justices became the major decision-making area of the job of CJI. Hence, in terms of judicial appointments, the Executive is not answerable to the public.
- Moreover, through this judgement, the question of judicial review involving the appointment and transfer of judges was cleared.
- The court also pronounced that fixing of the strength of judges in High Court is quite justified.
- Ratio Decidendi - In SUPREME COURT ADVOCATES ON RECORD ASSOCIATION VS UNION OF INDIA Case,1993, Supreme Court Constitution Bench overturned the ruling in SP Gupta's Case (S.P. Gupta v. Union of India). In the previous S. P. Gupta's case, Supreme Court Constitution Bench held that "consultation" does not mean "concurrence" and further ruled that the concept of the Chief Justice of India's primacy is not really to be

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found in the Constitution. However, in the latter case, it was a nine-judge bench which clarifies the meaning of consultation and concurrence. It bridged between the core meaning of the two terms and considered them as similar. In addition, CJI's primacy was established. It was a 7-2 majority judgement.

CRITIQUE OF JUDGEMENT

- If we talk about the basis on which the judgement was pass was in fault from the start. In any way, the term 'consultation' would be equal to 'concurrence'. It also plays a crucial point in turning the further cases on.
- The whole judgement was only on the basis of arguments which answers the questions which were never at stake. Mainly, the prime work of judiciary to answer the questions raised by its judgement or make changes to prevent future mistakes on basis of laws. However, in this case, there wasn't any prior reference, a significant portion of the majority conclusion is obiter. Only the "primacy" query and the judge's strength fixation were mentioned in the citation. As a result, all the other portion of either argument or judgement was obiter.
- Though by adapting this judiciary as the highest authority to make decisions regarding judicial matter decreased the political influence and favouritism up to an extent, but, it made the system more non-transparent. It gave rise to 'Judicial Legislation' which turned the system upside down. This was seen in a famous case called Unnikrishnan case.

CONCLUSION

The judgement explains the basis of intertwined relationship between judiciary and executive which prevailed earlier in the system. However, this advances the system by following the 'Separation of Power' principle. It regulates executive influence in judicial selections. Moreover, it reduced the dependence and influence of Executive on Judiciary. Hence, at last, the decision retains the authority of appointment in the hands of the CJI. As a result, this decision significantly lessened political interference in judicial affairs. It strengthens the fundamental principles of the constitution. Moreover, the transparency in the system increases by declining the questions related to biasness and favouritism.