CHAPTER III

OFFICERS AND SERVANTS OF THE SUPREME COURT AND THE HIGH COURTS*

Special provisions have been made in the Constitution by articles 146 and 229 in the matter of appointment of officers and servants of the Supreme Court and the high courts. The power is conferred on the chief justice of India in respect of appointment of officer's and servants on the establishment of the Supreme Court and in respect of the high courts in the states on the chief justice of the high court. The articles also provide that the power can be exercised by any other officer if directed by the chief justice. Subject to certain conditions prescribed in articles 146 and 229 absolute power of recruitment, appointment and control over the staff of the Supreme Court and the high court is conferred on the chief justice of the respective court.

Scheme and object

Article 146 and article 229 have a distinct and different scheme. On a comparison of article 148 relating to the service under the Comptroller and Auditor General of India and articles 98 and 187 relating to the staff of the secretariat of parliament and the state legislature, respectively, we find that Parliament and state legislature, respectively, are given the power to regulate recruitment and conditions of service and subject to any such law the President or the Governor, as the case may be, is empowered to regulate recruitment and conditions of service of the respective secretariat in consultation with the Auditor General or the Speaker, as the case may be. But under articles 146 and 229 full freedom is given to the respective chief justice in the matter of appointment of officers and servants of the Supreme Court or the high court, as the case may be. The approval of the President or the Governor is necessary only insofar it relates to matters specified in *proviso* to clause (2) because the finances have to be provided by the government. The unequivocal purpose and intention of the framers of the Constitution in enacting articles 146 and 229 is that in matters of appointment of officers and servants of the Supreme Court and the high courts the chief justice or his nominee should be the supreme

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authority and there be no interference by the executive except to the extent provided in the articles. This is essential to secure and maintain the independence of the Supreme Court and the high courts. The anxiety of the Constitution-makers to achieve that object is fully shown by putting the administrative expenses of the Supreme Court and the high court including salaries, allowances and pension payable to or in respect of officers and servants of the court at the same level as the salaries and allowances of judges and the amount as charged cannot be varied even by legislature.[1]

Direct recruitment

The only restriction contained in the *proviso* to articles 146(1) and 229(1) regarding direct recruitment is that the President and the Governor, respectively, may by rule require, that in such cases as may be specified in the rule no person not already attached to the court shall be appointed to any office connected with the court save after consultation with the concerned public service commission. In view of the *proviso* only in matters relating to direct recruitment, it is competent for the President or the Governor, to provide for consultation with the public service commission. Subject to such a provision if made, the power of the chief justice to regulate recruitment is absolute in relation to direct recruitment.[2]

Recruitment by promotion exclusively vested in the chief justice

The power to make appointment by way of promotion conferred on the Chief Justice of the Supreme Court and the high court, respectively, is absolute. After the direct recruitment of persons on the staff of the Supreme Court or the high court, they become persons already attached to the court and their further promotions are fully within the powers of the chief justice and cannot be regulated by rules framed by the President or the Governor and cannot be made the subject matter of consultation with the public service commission.

In the absence of any rules framed by the court or the chief justice, the direction of the chief justice operates even in the field of appointment. Accordingly, it was held, *in Hon'ble Chief Justice, High Court of Bombay* v. *B.S. Nayak*,[3] that the chief justice was well within his jurisdiction in deciding the norms of *merit-cum-seniority* for filling up the posts of private secretaries. Such a norms cannot be struk down on the ground that the same had not been given due publicity.

1 *M.Gurumoorthy* v. *Accountant General*, AIR 1971 SC 1850.
2 *Ibid.*
3 (2001) 9 SCC 763.

Power of the chief justice to regulate conditions of service

Clause (2) of article 146 and clause (2) of article 229 provide that subject to the provisions of law made by Parliament and the legislature of the state respectively, the conditions of service of officers and servants of the Supreme Court and the high court, respectively, shall be such, as may be prescribed by the rules by the Chief Justice of the Supreme Court or the high court, as the case may be, or by some other judge or officer authorised by the chief justice. The only restriction contained in the *proviso* to clause (2) of article 146 and clause (2) of article 229 is that the rules made under clause (2) of artcile 146 or under clause (2) of 229 shall insofar as they relate to salaries, allowances, leave or pension requires the approval of the President or the Governor, as the case may be. In other words, the matters relating to conditions of service insofar as it affects the finances of the union or the state is required to be approved by the President or the Governor as the case may be and in all other matters, the power of the chief justice to make appointment and to regulate conditions of service is absolute. This position has been made clear by the apex court in *Supreme Court Employees' Welfare Assn.* v. *Union of India*,[4] where it was observed:[5]

> Under article 146(2) the conditions of service of officers and servants of the Supreme Court shall be such as may be prescribed by the rules made by the Chief Justice of India or by some other judge or officer of the Court authorised by the Chief Justice of India to make rules for the purpose. This is, however, subject to the provisions of any law that may be made by Parliament. It is apparent from article 146(2) that it is primarily the responsibility of Parliament to lay down the conditions of service of the officers and servants of the Supreme Court, but so long as Parliament does not lay down such conditions of service, the Chief Justice of India or some other judge or officer of the Court authorised by the Chief Justice of India is empowered to make rules for the purpose. The legislative function of Parliament has been delegated to the Chief Justice of India by article 146(2). It is not disputed that the function of the Chief Justice of India or the judge or the officer of the Court authorised by him in framing rules laying down the conditions of service, is legislative in nature. The conditions of service that may be prescribed by the rules framed by the Chief Justice of India under article 146(2) will also necessarily include salary, allowances, leave and pensions of the officers and servants of the Supreme Court. The proviso to article 146(2) puts a restriction on the power of the Chief Justice of India by providing that the rules made

4 (1989) 4 SCC 187 at 217.
5 *Id.*, para 46.

> under article 146(2) shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the President of India. *Prima facie*, therefore, the conditions of service of the employees of the Supreme Court that are laid down by the Chief Justice of India by framing the rules will be final and conclusive, except that with regard to salaries, allowances, leave or pensions the approval of the President of India is required. In other words, if the President of India does not approve of the salaries, allowances, leave or pensions, it will not have any effect. The reason for requiring the approval of the President of India regarding salaries, allowances, leave or pensions is the involvement of the financial liability of the government.

Proceeding further, the court observed that the function of the Chief Justice of India to frame rules under article 146 (2) is legislative in nature. Though a piece of subordinate legislation, it is not a fullfledged legislative act requiring assent of the President of India. Therefore, the function of the President of India approving the rules so framed is not analogous to giving assent to a bill. The court, however, assuming that the function of President to grant approval is legislative in nature, has held that the President cannot be directed to grant approval.[6]

Though, no conditions have been laid down to be fulfilled before the President of India grants or refuses to grant approval under article 146 (2), in view of article 74 (1) it is the particular department in the ministry that considers the question of approval under the proviso to article 146 (2) and whatever advice is given to the President of India in that regard, the President of India has to act in accordance with such advice.[7]

However, the validity of the rules framed under article 146 (2) can be challenged on such grounds, as any other legislative acts can be challegned. So, if rules framed by chief justice of India and approved by the President of India offend articles 14 or 16, the same may be struck down by the court.[8]

As regards the application of the rules framed under article 309 of the Constitution is concerned, recently the apex court, in *K.K. Parmar* v. *H.C. of Gujarat*,[9] has held that a rule framed by the state in exercise of its power under proviso appended to article 309 of the Constitution of India may be applicable to employees of the high court but the executive instructions issued would not be and in particular when the same is contrary to or inconsistent with the rules framed by chief justice of the high court in terms of article 229 of the Constitution of India.

6 *Id.*, paras 49, 51 and 55.
7 *Id.*, para 62.
8 *Id.*, para 59.
9 (2006) 5 SCC 789.

Power of Parliament and state legislature

There is a significant difference between article 309 on the one hand and articles 146 and 229 on the other. Clause (1) of articles 146 and 229 deals with recruitment and the power is conferred exclusively on the chief justice subject only to the provision for consultation with the public service commission if rules are made by the President or Governor insofar it relates to direct recruitment as referred to earlier. Clause (2) of articles 146 and 229 deals with conditions of service. According to these clauses, the chief justice of the Supreme Court and the high court is given the power to regulate conditions of service subject to the law made by Parliament and the state legislature respectively regulating 'conditions of service'. On a comparison of article 309 with articles 146 and 229 we find that the two matters viz., (i) recruitment and (ii) conditions of service which are dealt with jointly in article 309 are separately dealt with under clauses (1) and (2) respectively of articles 146 and 229. The power of Parliament and state legislature is confined to regulating conditions of service and on matters relating to recruitment power is exclusively conferred on the chief justice.[10]

Government cannot interfere with appointments

The power of appointment to an office under the high court is exclusively vested in the chief justice. The power of the Governor is only limited to the giving of approval insofar as it relates to rules relating to salary, leave and pension. Therefore, it is not open to the government to interfere with the choice of an incumbent or appointment made by the chief justice. The registrar of the high court is an officer of the high court. The power to make appointment to the said post can be exercised only by the chief justice.[11]

Disciplinary matters outside purview of public service commission

The officers and members of the staff attached to the Supreme Court and the high courts clearly fall within the scope of the phrase *'person appointed to public services and posts in connection with the affairs of the state'* and also of the phrase *'a person who is a member of the civil service of Union or of a State'* as used in articles 310 and 311. But the phrase *'person serving under the Government of India or the Government of State'* referred to in article 320 seems to have reference to such persons in respect of whom the administrative control is vested in the respective governments functioning in the name of the President or the Governor, as the case may be. The officers and the staff of the Supreme Court and the high court cannot be said to fall within the scope of the above phrase because, in respect of them administrative control is

10 *Ibid.*

11 *State of Orissa* v. *Sudhansu Sekhar Misra*, AIR 1968 SC 647 at 650.

vested in the chief justice, who according to the Constitution, has the power of appointment and removal and of making rules for the conditions of service.[12] Consultation with the pubic service commission in respect of disciplinary matters as provided in article 320(3)(c) is required in respect of persons *'serving under the Government of India or the Government of a State'* as specifically stated in the article. Accordingly, there is no requirement for the chief justice to consult the public service commission in respect of disciplinary matters relating to officers and servants of the Supreme Court or the high court.[13]

Scope of power under article 229 regarding matters involving finance

Pay of officers of high court should be fixed with approval of the Governor: The power conferred under article 229 on the chief justice of high court to make appointments and to regulate the conditions of service of the officers and servants of the high court is subject to clause (2) of article 229. According to that clause, conditions of service insofar as they relate to salaries, allowances, leave or pension, require the approval of the Governor of the state. Therefore, in making an appointment if the chief justice wants to give a higher pay scale or special pay to any one, which is more than the scale sanctioned for the post, approval of the Governor is necessary. Any order passed by the chief justice without the approval of the Governor is invalid.[14] In cases where single set of statutory rules were framed by the chief justice of a high court containing administrative as well as financial provisions, only the financial provisions require the approval of the Governor and not the administrative provisions.[15]

Determination of different scales of pay for different categories of employees would ordinarily fall within the realm of an expert body like the pay commission or pay committee. The chief justice of the high court exercises constitutional power in terms of article 229 of the Constitution. This provision has evidently been made to uphold the independence of the judiciary. This provision shows that laying down the conditions of service applicable in the case of staff and officers of a high court is within the exclusive domain of the chief justice but in case of any financial implications involving therein the approval of the state Governor is imperative.[16]

The power of the chief justice of a high court on the administrative side to fix salaries of his staff is not absolute. Presumably, since this would require financial outlay and may have repercussions on the salaries of others, approval

12 *Ibid.*
13 *Pradyat Kumar Bose* v. *C.J. of Calcutta*, AIR 1956 SC 285: 1955(2) SCR 1331.
14 *State of Assam* v. *Bhubanchandra*, AIR 1975 SC 889: SLR 1975(1) SC 569 at 571-72.
15 *Satnam Singh* v. *Punjab & Haryana High Court*, (1997) 3 SCC 353.
16 *State of U.P.* v. *Section Officer Brotherhood*, (2004) 8 SCC 286.

of the Governor is expressly required. The Governor, therefore, has a constitutional right to examine the proposal of the chief justice relating to the salary of his staff and to either grant approval or withhold it. Power to grant approval implies the power to withhold it. Of course the power must be exercised reasonably and in public interest. This constitutional methodology for fixing the salary of the high court staff should not, ordinarily, be circumvented by the high court by passing a judicial order, which, in effect, directs the state to grant the salary scale desired by the high court without the approval of the Governor. A *mandamus* of this kind should not be issued unless there is a breakdown of the constitutional machinery resulting in grave injustice or public detriment. There can be genuine differences in perception and honest differences of opinion between the chief justice and the Governor/ state on the question of salaries, allowances or pension of the high court staff. It is desirable that such issues are resolved administratively in a reasonable manner by both sides and the provisions of the Constitution in article 229 are honoured.[17]

Since power to fix the scale is conferred, subject to the approval of the Governor, on the chief justice, the court cannot in the guise of judicial review usurp the powers conferred by article 229 of the Constitution and fix a pay scale different from the one prescribed in exercise of the said power.[18]

Recommendation of chief justice cannot be enforced: Under clause (2) of article 229 any rules regulating salaries of the members of the staff of the high court require the approval of the Governor. In the fitness of things when the chief justice recommends or proposes a particular pay scale, the same has to be accepted by the government. If, however, the proposal is rejected, recommendation made by the chief justice cannot be enforced by the issue of writ.[19]

The position was further clarified by the apex court in *C.G. Govindan* v. *State of Gujarat*,[20] where it was observed that a *mandamus* cannot be issued to grant approval to the salary scale desired by the high court unless there is a breakdown of the constitutional machinery resulting in grave injustice or public detriment. It was suggested by the court that such issues must be resolved administratively without invoking judicial power. Reiterating its stand, the Supreme Court, in *Union of India* v. *S.B. Vohra*,[21] has held that the differences

17 *C.G. Govindan* v. *State of Gujarat*, (1998) 7 SCC 625 at 634, paras 10, 11.

18 *Manmath Nath Gosh* v. *State of Gujarat*, (2005) 13 SCC 630.

19 *State of A.P.* v. *T.Gopalakrishna*, AIR 1976 SC 123; also see *Supreme Court Employees' Welfare Assn.* v. *Union of India*, *supra* note 3; *State of H.P.*, v. *P.D. Attri*, (1999) 3 SCC 217.

20 *Supra* note 17.

21 (2004) 2 SCC 150; also see, *State of U.P.* v. *Section Officer Brotherhood*, *supra* note 16.

of opinion between the chief justice and the President/Govenor should be mutually discussed and tried to be solved. High court on the judicial side should not ordinarily issue writ in the nature of mandamus to central or state government to comply with the decision of the chief justice but should instead refer the the matter back to central/state government with suitable directions. Only in exceptional cases high court on the judicial side should interfere and that too with care and circumspection.

Similar problem of lack of consensus between the state government and the chief justice was considered by the apex court in *High Court Employees Welfare Association, Calcutta* v. *State of West Bengal*,[22] where the state governement had refused to recommend the draft Calcutta High Court Services Rules, 1998, forworded by the chief justice for approval of the Governor mainly because of financial difficulties. On petition by the employees of the high court challenging the decision of the state government, the Supreme Court directed for the constitution of special pay commission comprising judges and administrators to make a report. It was further directed that on receiving such report, chief justice and the state government should thrash out the problem and work out an appropriate formula for fixation of pay scales of high court employees. It was also directed that the state government should bear in mind that the chief justice and other judges of high court alone could really appreciate the special nature of the work done in the high court and that the high court administration might face serious crisis in case of omission on the part of the state government to meet needs of high court.

Equation of posts- right for salary sanctioned for an equivalent post: When a post on the establishment of the high court is equated to another post in the secretariat the revised pay scale applicable to the latter post automatically becomes applicable to the post on the equated post on the establishment of the high court. The chief justice is not required to seek the approval of the required government for extending the revised pay scale. The equation of post creates a legal right in the officer concerned to claim all the benefits attached to the equated post from time to time in the matter of pay scales, allowances etc.,[23]

Similarly, when according to the directions issued by the central government under section 117 of the States Reorganisation Act, an officer on the establishment of the high court becomes entitled to the pay scale of the next promotional post to which he was entitled to in the parent state and the said pay scale is accorded to the officer by the chief justice after securing the financial approval of the Governor, there is no power vested in the accountant general to raise an objection to the effect that the extending of the higher pay scale to the officer concerned was not in accordance with law. Having regard

22 (2004) 1 SCC 334.

23 *Satpal Singh* v. *Union of India*, SLR 1977(1) P&H 159.

to the power conferred on the chief justice under article 229, his order fixing pay scale of an officer on the establishment of the high court is final when the financial sanction of the government exists.[24]

But, based on the claim for higher scales of pay on par with those payable to their counterparts working in other high courts, it was held in *State of U.P.* v. *Section Officer Brotherhood,*[25] that the high court in exercise of its judicial power is not justified in directing the state government to grant higher pay scales to employees of Allahabad High Court in parity with those payable to their counterparts in Delhi High Court.

Jurisdiction to examine the nature of work and to grant particular pay scale to the staff of the high court is possessed, subject to the approval of the Governor, solely by the chief justice under article 229 and not by the high court under article 226 by applying the doctrine of 'equal pay for equal work'. It is true that the doctrine of 'equal pay for equal work' is an equitable principle but it would not be appropriate for the high court in exercise of its discretionary jurisdiction under article 226 to examine the nature of work discharged by the staff attached to the judges of the court and direct grant of any particular pay scale to such employees, as that would be a matter for the chief justice within his jurisdiction under article 229 (2) of the Constitution. Thus, in *State of Maharashtra* v. *Association of Court Stenos., P.A., P.S.,*[26] the high court has issued a writ of *mandamus* directing a particular pay scale to be given to the court stenographers, personal assistants and personal secretaries attached to the judges of the court on par with senior personal assistants to the chief secretary of the state pursuant to the Fifth Pay Commission report, is held to be not sustainable.

Order contrary to rules: Under article 229, the power is conferred on the chief justice to regulate recruitment and conditions of service of servants appointed on the establishment of the high court. But once rules are framed, no order can be made by the chief justice contrary to the rules. The contention that as the chief justice has the power under article 229 to regulate recruitment and conditions of service, any order passed by him even if it is contrary to rules, is valid on the ground that it constitutes an amendment of the rules is untenable. An administrative order passed in contravention of rules cannot be constructed as a rule. Doing so would also be violative of article 16. Therefore, an order made by which seniority was affected in contravention of the rules with retrospective effect and consequential denial of promotion, is not in accordance with law.[27]

24 *Kulkarni V.K.* v. *Accountant General*, SLR 1978 (1) Kar 138.
25 *Supra* note 16.
26 (2002) 2 SCC 141.
27 *M.J. Thomas* v. *Kerala High Court*, AIR 1977 Ker 166.

In this context it is pertinent to refer to the observation of the apex court, in *H.C. Puttaswamy* v. *Chief Justice of Karnataka High Court*,[28] where the court while explaining the importance and object of article 229 has observed:[29]

> The object of this article was to secure the independence of the high court, which cannot be regarded as fully secured unless the authority to appoint supporting staff with complete control over them is vested in the chief justice. There can be no disagreement on this matter. There is imperative need for total and absolute administrative independence of the high court. But the chief justice or any other administrative judge is not an absolute ruler. Nor he is a free wheeler. He must operate in the free world of law, not in the neighbourhood of sorbid atmosphere. He has a duty to ensure that in carrying out the administrative functions, he is actuated by same principles and values as those of the court he is serving. He cannot depart from and indeed must remain committed to the constitutional ethos and traditions of his calling. We need hardly say that those who are expected to oversee the conduct of others must necessarily maintain higher standards of ethical and intellectual rectitude. The public expectations do not seem to be less exacting.

The power to act in the absence of rules: In the absence of any law made by the legislature regulating recruitment and conditions of service of the staff of the high court, the chief justice, in exercise of his powers under clause (2) of article 229 or any judge nominated by him, can regulate the conditions of service regarding salary, allowances etc. However, the rules which involve finance requires the approval of the Governor, namely, the state government. Having regard to the high status of the chief justice and the spirit of article 229, ordinarily and generally an approval should be accorded to the proposal of the chief justice. But the approval is not a mere formality. Therefore, though recommendation was made by the chief justice to equate the pay scales of certain categories of members of the staff of the high court to those of the secretariat, the refusal on the part of the state government to accord approval does not create a right in the officers concerned to seek a writ of *mandamus* directing the government to approve the proposal, as the refusal on the part of the state government cannot be said to be *ultra vires*.[30]

Power of appointment – wider amplitude

The power conferred on the chief justice under article 229(1) to make appointments on the staff of the high court is of wider amplitude. The power

28 (1991) Supp (2) SCC 421.
29 *Id.* at para 11.
30 *State of A.P.* v. *T.Gopalakrishna Murthy*, AIR 1976 SC 123.

to make appointment includes the power to suspend, dismiss, remove or compulsorily retire from service any employee on the establishment of the high court. Article 229 makes the power of appointment, dismissal, suspension, removal, reduction in rank, compulsory retirement including the power to prescribe conditions of service the sole preserve of the chief justice. No extraneous executive authority can interfere with the powers of the Chief Justice or his nominee except to the extent indicated in the *proviso* to article 229. The object of conferring such power on the chief justice was to ensure the independence of the high court.[31]

Power to make rules with retrospective effect

It is well settled that the President or the Governor as the case may be has the power to make rules regulating recruitment and conditions of service with retrospective effect under article 309. So has the chief justice.[32]

Jurisdiction of Andhra Pradesh special tribunal

Having regard to the special provisions governing the officers and servants of the high court, the administrative tribunal constituted for Andhra Pradesh by virtue of article 371-D of the Constitution with jurisdiction to entertain, deal with or decide representations of members of the civil service of the state, does not include the jurisdiction to entertain representations from the officers and servants of the Andhra Pradesh High Court and the members of the subordinate judiciary. Construed loosely in its widest general sense, the phrase 'civil service of the state' used in clause (3) of the Andhra Pradesh Administrative Tribunal Order, 1975, might include the officers and servants of the high court as well as of the subordinate judiciary. However, understood in its narrow sense in harmony with the basic constitutional scheme regarding the independence of judiciary embodied in chapters V and VI of part VI of the Constitution, and in particular the specific articles 229 and 235, the phrase could not take in staff of the high court and of the subordinate judiciary. Therefore, the tribunal has no jurisdiction to entertain any appeal or representation by a member of the staff of the high court or of the staff of subordinate courts.[33]

31 See *supra* note 13.

32 *Brij Kishore* v. *Bhatia*, SLR 1985(1) P&H 121.

33 *Chief Justice, A.P.* v. *L.V.A. Dikshitulu*, 1978 L&I Cases 1672: 1979(1) SLR 1 (SC).