Dated: 26th April, 2018

Kindly refer to your D.O. letter dated 19.01.2018 forwarding therein the recommendations of the Supreme Court Collegium for the appointment of (i) Shri Justice K.M. Joseph, Chief Justice, Uttarakhand High Court [PHC: Kerala]; and (ii) Ms. Indu Malhotra, Senior Advocate, as Judges of the Supreme Court of India.

2. The President of India has been pleased to approve the appointment of Ms. Indu Malhotra as a Judge of Supreme Court of India. A copy of the notification is enclosed for your kind perusal.

3. With regard to the recommendation relating to Shri Justice K.M. Joseph, the proposal has been examined and the following observations are made;

a) In the All India High Court Judges' Seniority List, Shri Justice K.M. Joseph is placed at serial number 42. There are presently eleven Chief Justices of various High Courts who are senior to him in All India High Court Judges' Seniority List.

b) The High Courts, namely Calcutta, Chhattisgarh, Gujarat, Rajasthan, Jharkhand, Jammu & Kashmir, Uttarakhand and some smaller High Courts namely Sikkim, Manipur, Meghalaya are not represented in the Supreme Court at present.

c) Shri Justice K.M. Joseph's parent High Court is the Kerala High Court. If he is to be appointed as Judge of the Supreme Court, the Kerala High Court - a comparatively small High Court - would have two Judges from the same parent High Court in the Supreme Court.

d) It may also be relevant to mention here that there is no representation of Scheduled Caste / Scheduled Tribe communities in the Supreme Court since long.

4. It would be appropriate to mention here that Kerala High Court has adequate representation in the Supreme Court and among Chief Justices in various High Courts. Shri Justice Kurian Joseph, who was elevated as Supreme Court Judge (PHC: Kerala) on 8-3-2013 is from the Kerala High Court. Additionally, there are two Chief Justices (other than Shri Justice K.M. Joseph, presently Chief Justice of Uttarakhand High Court), namely Shri Justice T.B. Radhakrishnan, Chief Justice, Chhattisgarh High Court and Shri Justice Antony Dominic, Chief Justice, Kerala High Court, whose parent High Court is Kerala.

5. The Government is firmly of the view that the judgements in Second and Third Judges' cases, both decided by nine Judge Bench of the Supreme Court, are to be borne in mind while making appointments

to the very important and high constitutional office of a Supreme Court Judge. I quote;

> *".....Inter se seniority amongst judges in their High Court and their combined seniority of All-India basis is of admitted significance in the matter of future prospects..." [Para 478 (3), page 702(1993) 4 SCC 441]*

> *"Due consideration of every legitimate expectation in the decision making process is a requirement of the rule of non-arbitrariness and, therefore, this also is a norm to be observed by the Chief Justice of India in recommending appoints to the Supreme Court. Obviously, this factor applies only to those considered suitable and at least equally meritorious by the Chief Justice of India, for appointment to the Supreme Court. Just as High Court Judge at the time of his initial appointment has the legitimate expectation to become Chief Justice of a High Court in his turn in the ordinary course, he has the legitimate expectation to be considered for appointment to the Supreme Court in his turn, according to his seniority.*

> *This legitimate expectation has relevance on the ground of longer experience on the Bench, and is a factor material for determining the suitability of the appointee. Along with other factors, such as, proper representation of all sections of the people from all parts of the country, legitimate expectation of the suitable and equally meritorious judges to be considered in their turn is a relevant factor for due consideration while making the choice of the most suitable and meritorious amongst them,*

the outweighing consideration being merit, to select the best available for the apex court." [Para 478 (4), page 703 (1993) 4 SCC 441]

6. In the subsequent answer to the Presidential reference under Article 143, the Supreme Court, in Third Judges' case *[(1998) 7 SCC 739]*, while noting the above directions in para 25, taking note of outstanding merit and the need for regional representation, in case there is none, further observed in para 28, *inter alia,* as follows;

> *"...all that was intended to be conveyed was that it was very natural that senior High Court judges should entertain hopes of elevation to the Supreme Court and that the Chief Justice of India and the Collegium should bear this in mind." [(1998) 7 SCC p. 767, para 28]*

7. It may be stated that the Collegium System is a creation of judicial decision of the Supreme Court. The terms and conditions and other parameters are also laid down in judicial orders governing appointment of judges in the Constitutional courts. The seniority of judges also plays its own critical role. It is understood that seniority of judges of High Court is only maintained at All India Level. Obviously, this is reflective of their seniority and also the parent High Court. From our records, it is evident that to ensure regional representation, seniority may not have been taken as an important consideration but in case where the High Court concerned is adequately represented in the Supreme Court and also as Chief Justices of different High Courts, then this consideration cannot be, and should not be, ignored all together to the detriment and prejudice of other senior judges.

8. In view of the sanctioned judge strength of Kerala High Court of 47 judges, it has received adequate representation in the Supreme Court and as Chief Justices of High Courts. At this stage, elevation of one more judge from Kerala High Court as a Judge of the Supreme Court of India does not appear to be justified as it does not address the legitimate claims of the Chief Justices and Puisne Judges of many other High Courts and forestalls the claim of other senior Chief Justices and Puisne Judges. It is also, in our considered view, not in accord with the parameters laid down by the Supreme Court itself in the Second Judges' Case [(1993) 4 SCC 441] and reiterated in Third Judges' case [(1998) 7 SCC 739].

9. Taking into consideration the points mentioned above, the proposed appointment of Shri Justice K.M. Joseph as a Judge of the Supreme Court at this stage does not appear to be appropriate. It would also not be fair and justified to other more senior, suitable and deserving Chief Justices and senior Puisne Judges of various High Courts. For the reasons mentioned in the foregoing paragraphs, the government has been constrained to segregate the recommendations of the Supreme Court Collegium received vide your D.O. letter dated 19.01.2018. It may be mentioned here that such segregation of proposals has been done in many cases earlier, which include appointment of Judges to various High Courts and also to the Supreme Court in the interest of expeditious action on appointments and filling up of vacancies.

10. Keeping in view the vacancies of Judges in the Supreme Court, the President has been pleased to approve the appointment of Ms. Indu Malhotra, Senior Advocate as Judge of the Supreme Court

while the case of Shri Justice K.M. Joseph, Chief Justice, Uttarakhand High Court, as Judge of Supreme Court has been decided to be referred back for reconsideration of the Supreme Court Collegium. **This proposal for reconsideration of the case of Shri Justice K. M. Joseph has the approval of Hon'ble President and Hon'ble Prime Minister.**

10. Accordingly, for the elaborate reasons outlined above, the recommendation of Supreme Court Collegium for appointment of Shri Justice K.M. Joseph, Chief Justice, Uttarakhand High Court, as a Judge of Supreme Court, is referred back for reconsideration of Supreme Court Collegium.

Bar & Bench (www.barandbench.com)

Shri Justice Dipak Misra,
Hon'ble Chief Justice of India,
Supreme Court of India,
5 Krishna Menon Marg,
New Delhi.