

SUPREME COURT OF INDIA

This file relates to reconsideration of the proposal for appointment of Shri Saurabh Kirpal, Advocate as Judge of the Delhi High Court.

The recommendation unanimously made by the Collegium of the Delhi High Court on 13 October 2017 and approved by the Supreme Court Collegium on 11 November 2021 has been referred back to us on 25 November 2022 for reconsideration in light of the observations made in the file.

The proposal has been pending for over five years. From the letters of the Research & Analysis Wing (R&AW) dated 11 April 2019 and 18 March 2021, it appears that there are two objections to the recommendation which was made by the Collegium of this Court on 11 November 2021 approving the name of Shri Saurabh Kirpal namely: (i) the partner of Shri Saurabh Kirpal is a Swiss National, and (ii) he is in an intimate relationship and is open about his sexual orientation.

The letter of the Law Minister dated 01 April 2021 states that though “homosexuality stands de-criminalised in India, nonetheless same-sex marriage still remains bereft of recognition either in codified statutory law or uncodified personal law in India”. Moreover, it has been stated that the candidate’s “ardent involvement and passionate attachment to the cause of gay-rights” would not rule out the possibility of bias and prejudice.

Both the objections are dealt with below:

As regards the first objection, the two communications of R&AW do not reflect any apprehension in regard to the individual conduct or behaviour of the partner of Shri Saurabh Kirpal having a bearing on national security. There is no reason to pre-suppose that the partner of the candidate, who is a Swiss National, would be inimically disposed to our country, since the country of his origin is a friendly nation. Many persons in high positions including present and past holders of constitutional offices have and have had spouses who are foreign Nationals. Hence, as a matter of principle, there can be no objection to the candidature of Shri Saurabh Kirpal on the ground that his partner is a foreign National.

As regards the second objection, it needs to be noted that the decisions of the Constitution Bench of this Court have established the constitutional position that every individual is entitled to maintain their own dignity and individuality, based on sexual orientation. The fact that Mr. Saurabh Kirpal has been open about his orientation is a matter which goes to his credit. As a prospective candidate for judgeship, he has not been surreptitious about his orientation. In view of the constitutionally recognized rights which the candidate espouses, it would be manifestly contrary to the constitutional principles laid down by the Supreme Court to reject his candidature on that ground. Shri Saurabh Kirpal possesses competence, integrity and intellect. His appointment will add value to the Bench of the Delhi High Court and provide inclusion and diversity. His conduct and behaviour have been above board. It may have been advisable for the candidate not to speak to the Press in regard to the reasons which may have weighed in the recommendations of the Collegium being sent back for reconsideration. However, this aspect should not be considered

as a negative feature, particularly since the name has remained pending for over five years. The overwhelmingly positive aspects of the candidature of Shri Saurabh Kirpal must, therefore, weigh in the balance.

In this backdrop, the Collegium resolves to reiterate its recommendation dated 11 November, 2021 for appointment of Shri Saurabh Kirpal as a Judge of the Delhi High Court which needs to be processed expeditiously.

(Dhananjaya Y Chandrachud), CJI

(Sanjay Kishan Kaul), J

(K.M. Joseph), J

January 18, 2023

