CIVIL MISCELLANEOUS

Before S. B. Capoor and R. S. Narula, JJ.

MANMOHAN SINGH TANDON,—*Petitioner*

versus

SHRI MANMOHAN SINGH GUJRAL AND OTHERS,—*Respondents*

Civil Writ 2264 of 1968

December 6, 1968

Constitution of India (1950)—*Articles* 233 *and* 372—*Punjab Courts Act* (*VI of* 1918)—*Section* 20, *not providing consultation with the High Court by the State Government for appointing a District Judge—Section—Whether* ultra vires *Article* 233—*Functions assigned to the Governor under Article* 233(1)—*Whether can be performed by the State Government in the name of the Governor—Position of Union Territories—Whether different.*

Punjab Reorganisation Act (*XXXI of* 1966)—*Section* 91—*Appointment of a District Judge for Union Territory of Chandigarh by the Chief Commissioner—Whether valid.*

Held, that there is no doubt that whereas the expression "State Government" has been used in section 20 of the Punjab Courts Act, the expression "Governor" has been used in clause (1) of Article 233 of the Constitution. There is also no dispute about the fact that section 20 of the Punjab Courts Act does not require any consultation being made by the State Government with the High Court for making appointment of a District Judge, but clause (1) of Article 233 of the Constitution does require such consultation being made by the Governor, as a condition precedent. These two points of difference will not, however, make section 20 of the Act unconstitutional. The effect of clause (1) of Article 372 of the Constitution is two-fold (i), that all laws in force in the territory of India immediately before the commencement of the Constitution continue in force until altered or repealed or amended by a competent Legislature or other competent authority; and (ii) such continuing in force of the pre-constitutional laws is "subject to the other provisions of the Constitution." The result is that if the Constitution contains a provision corresponding to the one contained in any other pre-existing law, but the requirements of the two provisions are different, it is the constitutional provision which shall prevail over the statutory provision contained in the pre-constitution Act. If the two provisions are irreconciliable, the statutory provision will be deemed to be *ultra vires* the constitutional provision. If, however, the variance or difference only lies in some additional requirement imposed by the Constitution, the statutory provision has merely to be read subject to the constitutional provision, and is deemed to have been superseded to that extent. Section 20 of the Punjab Courts Act is, therefore, not *ultra vires* Article 233 of the Constitution. (Para 5)

Held, that keeping in view the legislative history of the provisions of Article 233 (1) of the Constitution and the history behind the enactment of section 254 of the Government of India Act, 1935, as well as the scope of

difference between certain specified constitutional powers of the Governors on the one hand and the executive powers of the State Government headed by the Governor on the other, it seems that in States administered by a Governor with the aid of Council of Ministers, the Governor himself is the appointing authority named by the Constitution and that the functions assigned to him by clause (1) of Article 233 of the Constitution cannot be performed by the State Government merely in the name of the Governor; but so far as the Union Territories in which there is no Council of Ministers are concerned, the position is different. The argument to the effect that the intention behind the particular phraseology used in Article 233 of the Constitution is to keep the Ministers out of appointment of District Judges as much as possible, will not apply to such Union Territories as no question of any ministerial interference can arise and it is the President of India who is to either administer the territory himself or through an Administrator to the extent to which he may delegate his functions to such Administrator. (Para 12)

Held, that under section 91 of Punjab Reorganisation Act, it is the Central Government which has the power in respect of the Union Territory of Chandigarh to specify the authority, officer or person who on and with effect from November 1, 1966 (the appointed day), shall be competent to exercise such functions as are exercisable under any law in force on that day as may be mentioned in the notification issued by the Central Government in that behalf. The Union Government having issued the notification naming the Chief Commissioner of Chandigarh as the officer who will exercise all the functions of the State Government, the appointment of a District Judge by the Chief Commissioner is fully authorised. Even irrespective of the provisions of section 91 of the Act, the President of India can and has delegated his powers in respect of the administration of Union Territory of Chandigarh to the Chief Commissioner under Article 239(1) of the Constitution. There is, therefore, no invalidity in the appointment of the District Judge by the Chief Commissioner of Union Territory of Chandigarh. (Para 15)

Petition under Articles 226, 227 *and* 228 *of the Constitution of India praying that a writ in the nature of* Quo Warranto *or any other appropriate writ, order or direction be issued quashing the Notification appointing the respondent No.* 1 *as District Judge, Chandigarh and directing the respondent No.* 1 *to show by virtue of what authority he was holding the office of the District Judge, Chandigarh or in the alternative praying that in the exercise of the powers under Article* 228 *of the Constitution, the case between respondent No.* 4 *and the petitioner be withdrawn from the respondent No.* 1 *and either this Hon'ble Court may dispose of the case itself or determine the question of law as to the interpretation of Articles* 233 *and* 239 *of the Constitution and return the case to a proper Subordinate Court.*

B. S. KHOJI AND BALBIR SINGH BINDRA, ADVOCATES, for the Petitioner.

ABNASHA SINGH, ADVOCATE *for* ADVOCATE-GENERAL, PUNJAB, for Respondents Nos. 1 to 3 and B. S. BHATIA, ADVOCATE for Respondent No. 4.

JUDGMENT

NARULA, J.—The appointment of Manmohan Singh Gujral respondent No. 1, a permanent Senior Scale Superior Judicial Service Officer of the Punjab Government, as District Judge, Chandigarh, has been challenged in this writ petition by Manmohan Singh Tandon petitioner (who is the opposite party in a pending petition for annulment of his marriage filed by Shrimati Rajinder Kaur, respondent No. 4, in the Court of the District Judge, Chandigarh), on the following grounds :—

(i) Section 20 of the Punjab Courts Act (6 of 1918), (as subsequently amended), under which notification, dated April 1, 1968 (Annexure 'A'), appointing respondent No. 1, as District Judge, Chandigarh, has been issued, is *ultra vires* Article 233(1) of the Constitution;

(ii) The appointment of respondent No. 1 as District Judge, Chandigarh, has been made in violation of Article 233(1) of the Constitution, as the High Court has not been consulted before making the same;

(iii) The Chief Commissioner, Chandigarh, who purports to have made the appointment, has no jurisdiction or authority under the Constitution to appoint a District Judge, and this power which vests, for the Union Territory of Chandigarh, in the President of India, has not been delegated by the latter to the Chief Commissioner, Chandigarh, under Article 239 of the Constitution; and

(iv) The appointment of respondent No. 1 as District Judge, Chandigarh, has in fact not been made either by the President of India or even by the Chief Commissioner, Chandigarh, and the impugned notification is not immune from this attack as it does not have the protection of clause (3) of Article 166 of the Constitution, inasmuch as section 46 of the Union Territories Act, (20 of 1963) does not apply to Chandigarh.

(2) The Union Territory of Chandigarh was carved out of the erstwhile State of Punjab by section 4 of the Punjab Reorganisation Act (31 of 1966) (hereinafter called the Reorganisation Act) on and with effect from November, 1966. Thereupon the area comprised

in the said Union Territory ceased to form part of the then existing State of Punjab. Notification No. S.O. 3269 of the Ministry of Home Affairs, New Delhi, was issued in Gazette of India Extraordinary, dated November 1, 1966, under section 4 of the Punjab Reorganisation Act. The notification (Annexure 'B') provided, *inter alia* :—

> "And whereas the powers exercisable by the State Government under any such law as aforesaid are now exercisable by the Central Government;
>
> Now, therefore, in pursuance of clause (1) of Article 239 of the Constitution and all other powers enabling him in this behalf, the President hereby directs that, subject to his control and until further orders, the Administrator of the Union Territory of Chandigarh shall, in relation the said territory, exercise and discharge, with effect from the 1st day of November, 1966, the powers and functions of the State Government under any such law."

On the same day, i.e., on November 1, 1966, Government of India, Ministry of Home Affairs notification No. G.S.R. 1875 (Annexure 'R-2') was published in the Gazette of India extraordinary of the same day under clause (1) of Article 239 of the Constitution in the following words :—

> "In exercise of the powers conferred by clause (1) of Article 239 of the Constitution the President hereby directs that all orders and other instruments made and executed in the name of the Chief Commissioner of the Union Territory of Chandigarh, shall be authenticated by the signature of a Secretary, a Deputy Secretary, an Under-Secretary, an Assistant Secretary in any of the Departments of the Chandigarh Administration."

(3) On February 19, 1968, the Chief Justice and Judges of this Court directed the posting of respondent No. 1, as District and Session Judge, Chandigarh, and an order of this Court under the signature of the Registrar of this Court to the above effect was issued (copy whereof is Annexure 'R-1'), and copies of the said order were endorsed to the then District and Sessions Judge, Chandigarh (Mr. Jasmer Singh) to the Home Secretary to the Chandigarh Union Territory Administration, and to various other Departments of the Punjab Government. Thereupon formal notifications of the appointment of respondent No. 1, as Sessions Judge and as District Judge,

Chandigarh, were issued in the Government of India Gazette (Chandigarh Administration) Extraordinary, dated April 1, 1968 (Annexure 'A' to the writ petition) in the following terms :—

> "No. 2651-R-1(2H)-68/6952.—In exercise or the powers conferred upon him by sub-section (1) of section 9 of the Code of Criminal Procedure, 1898, the Chief Commissioner, Chandigarh, in consultation with the High Court of Punjab and Haryana is pleased to appoint Shri Manmohan Singh Gujral, as Sessions Judge of Chandigarh Sessions Division with effect from the date he assumes charge of office.
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> No. 2651-H-1(2H)-68/7530.—In exercise of the powers conferred upon him by section 20 of the Punjab Courts Act, 1918, as amended by Act IX of 1922, the Chief Commissioner, Chandigarh, is pleased to appoint Shri Manmohan Singh Gujral as District Judge for the Civil District of Chandigarh with effect from the date he assumes charge of his office."

Respondent No. 1 actually took over as District and Sessions Judge, Chandigarh, on and with effect from February 19, 1968 (A.N.) and is functioning as such since then. In the petition of respondent No. 4 for the annulment of her marriage with the petitioner, the written statement of the petitioner was filed on July 12, 1968, wherein he took a preliminary objection to the effect that the appointment of respondent No. 1, as District Judge, Chandigarh, was not valid. Before any decision could be given by the District Judge on the abovesaid preliminary matter, the present petition was filed under Articles 226, 227 and 228 of the Constitution on July 22, 1968, on the ground that the case involves the question relating to the validity and constitutionally of section 20 of the Punjab Court Act, and the said question cannot be decided by respondent No. 1, as he is himself a creature of the said Act. The prayer in the writ petition is for the issuance of a writ in the nature of *quo warranto* directing respondent No. 1, to show this Court the authority by which he is holding the office of the District Judge, Chandigarh. The alternative prayer in the petition is that the civil proceedings between respondent No. 4, and the petitioner pending in the Court of the District Judge, Chandigarh, may be withdrawn to this Court

under Article 228 of the Constitution and may either be disposed of here or may be returned to a proper Subordinate Court after determining the abovesaid question of law relating to the interpretation of Articles 233 and 239 of the Constitution. The petition was admitted to a Division Bench by the Motion Bench (Mahajan and Jain, JJ.), on July 23, 1968. In the affidavit of Shri Daljeet Singh, I.A.S., Finance Secretary, Union Territory Administration, Chandigarh, filed in reply to the writ petition, it has been stated *inter alia* as follows :—

> "It is submitted that respondent No. 1 was appointed as District and Sessions Judge in accordance with law, in consultation with the Hon'ble Punjab and Haryana High Court."
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> "As a matter of fact, the appointment (of respondent No. 1) had been made in consultation with the Hon'ble High Court Punjab and Haryana. Copy of the letter vide which respondent No. 1 was posted as District and Sessions Judge, Chandigarh, by the Hon'ble the Chief Justice and Hon'ble Judges of Punjab and Haryana High Court is enclosed herewith as Annexure R-1."
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> "Under section 20 of the Punjab Courts Act, the appointment of a District Judge is made by the State Government and all executive orders are expressed in the name of the Governor. The Administrator of the Union Territory has been vested with the powers and functions of the State Government, and as such, the Administrator will be deemed to be the State Government under section 20 of the Punjab Courts Act, and he was fully competent to make the appointment of respondent No. 1, as District Judge."

(4) It has also been stated in the abovesaid return of respondents Nos. 2 and 3 that the assertions made by the petitioner in paragraph of the writ petition are incorrect. It is in sub-paragraph (d) of paragraph 5 of the writ petition that an allegation has been made to the effect that the order contained in the impugned notification has not been passed by the Chief Commissioner or by the President of India. Copies of notification, dated November 1, 1966, under clause (1) of Article 239 of the Constitution and of the order of

the High Court, dated February 19, 1968 (Annexures 'R-2' and 'R-1' respectively), have been filed with the return.

(5) Mr. B. S. Khoji, the learned counsel for the petitioner, submitted that section 20 of the Punjab Courts Act, which is in the following terms, is unconstitutional because it does not provide for consultation with the High Court requisite under Article 233(1) of the Constitution and as it authorises "the State Government" to appoint District Judges though the power to make such appointments is vested by the aforesaid Article of the Constitution in the Governor of the State :—

> "The State Government shall appoint as many persons as it thinks necessary to be District Judges, and shall post one such person to each district as District Judge of the District :
>
> Provided that the same person may, if the State Government thinks fit, be appointed to be District Judge of two or more Districts."

Clause (1) of Article 233 of the Constitution reads as follows:—

> "Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State."

There is no doubt that whereas the expression "State Government" has been used in section 20 of the Punjab Courts Act, the expression "Governor" has been used in clause (1) of Article 233 of the Constitution. There is also no dispute about the fact that section 20 of the Punjab Courts Act, does not require any consultation being made by the State Government with the High Court for making appointment of a District Judge, but clause (1) of Article 233 of the Constitution does require such consultation being made by the Governor, as a condition precedent for the appointment of a District Judge. The two points of difference referred to above would not, however, make section 20 of the Punjab Courts Act unconstitutional. Article 372(1) of the Constitution reads as follows :

> "Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the

other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority."

In my opinion the effect of clause (1) of Article 372 of the Constitution is two-fold, viz., (i) that all laws in force in the territory of India immediately before the commencement of the Constitution continue in force until altered or repealed or amended by a competent Legislature or other competent authority; and (ii) such continuing in force of the pre-constitutional laws is "subject to the other provisions of the Constitution." The result is that if the Constitution contains a provision corresponding to the one contained in any other pre-existing law, but the requirements of the two provisions are different, it is the constitutional provision which shall prevail over the statutory provision contained in the pre-constitution Act. If the provisions are irreconcilable, the statutory provision would be deemed to be *ultra vires* the constitutional provision. If, however, the variance or difference only lies in some additional requirement imposed by the Constitution, as in the instant case, the statutory provision has merely to be read subject to the constitutional provision, and is deemed to have been superseded to that extent. In *South India Corporation* (P) *Ltd.* v. *Secretary, Board of Revenue, Trivendrum and another* (1) it was held that the words "subject to the other provisions of the Constitution" in clause (1) of Article 372 should be given a reasonable interpretation, an interpretation which would carry out the intention of the makers of the Constitution, and also which is in accord with the constitutional practice in such matters. Their Lordships observed :—

"The Article posits the continuation of the pre-existing laws made by a competent authority notwithstanding the repeal of Article 395, and the expression "other" in the Article can only apply to provisions other than those dealing with legislative competence. A pre-Constitution law made by a competent authority, though it has lost its legislative competency under the Constitution, shall continue in force, provided the law does not contravene the 'other provisions' of the Constitution. The words

(1) A.I.R. 1964 S.C. 207.

"subject to other provisions of the Constitution' mean that if there is an irreconcilable conflict between the pre-existing law and a provision or provisions of the Constitution, the latter shall prevail to the extent of that inconsistency."

(6) In this state of law it does not appear to be correct for the learned counsel for the petitioner to contend that section 20 of the Punjab Courts Act, is unconstitutional. In any event, nothing would turn on this submission of counsel, if the requirements of clause (1) of Article 233 of the Constitution have been satisfied. The order of the appointment of respondent No. 1 cannot be set aside or annulled merely because section 20 of the Punjab Courts Act has been mentioned in the relevant notification instead of mentioning clause (1) of Article 233 of the Constitution. If on the other hand, the requisite constitutional requirements for making an appointment of a District Judge have not been satisfied in the present case, the order of appointment would have to be annulled even if Article 233(1) of the Constitution itself had been mentioned in the notification.

(7) Nor have we been able to find any force whatever in the second submission of Mr. Khoji to the effect that the High Court had not been consulted in making the appointment of respondent No. 1 as District Judge of Chandigarh. The order for posting respondent No. 1 as District Judge of Chandigarh was passed by the High Court itself on February 19, 1968. The "note" under the order, dated February 19, 1968 (Annexure 'R-1') reads as follows:—

"Shri Manmohan Singh Gujral, after relinquishing charge of his present post, should assume charge as District and Sessions Judge, Chandigarh, immediately."

The second endorsement on the said order reads :—

"Copy forwarded to the Home Secretary to Chandigarh Union Territory Administration, Chandigarh, for the information and necessary action.

It is requested that appointment of Shri Manmohan Singh Gujral as District Judge and Sessions Judge, Chandigarh, from the date he assumes charge as such, may kindly be notified."

The body of the communication of the High Court states:—

"The Hon'ble the Chief Justice and Judges are pleased to make the following posting:—

Shri Manmohan Singh Gujral, Legal Remembrancer to Government, Punjab, Chandigarh, posted as District and Sessions Judge vice Shri Jasmer Singh appointed as Legal Remembrancer to Government, Punjab."

On the receipt of the above-said communication (Annexure 'R-1'), the Home Secretary, Chandigarh Administration, forwarded two notifications for publication in the Government Gazette. These notifications were prepared on the 19th/20th of February, 1968, but were sent for publication in March, 1968, and were actually published in the Official Gazette, dated April 1, 1968. Whereas in the notification relating to the appointment of respondent No. 1 as Sessions Judge, the words "in consultation with the High Court of Punjab and Haryana" were published, the said words were somehow missed in the notification relating to the appointment of first respondent as District Judge, though both the notification were issued in pursuance of the same communication of the High Court, and were published on the same page of the Government Gazette. This is, however, immaterial as clause (1) of Article 233 of the Constitution makes consultation with the High Court a condition precedent for the appointment of a District Judge, but does not require the formal notification of appointment to say definitely that such consultation has taken place. It is no doubt proper that the factum of consultation with the High Court having taken place should be mentioned in the notification to avoid unnecessary dispute like the one which has been raked up in the present case, but mere want of the factum of the consultation being mentioned in the notification would not invalidate the appointment itself. As to whether the High Court was in fact consulted for appointing the first respondent as District Judge of Chandigarh or not, there appears to be no doubt whatever. The petitioner has not even stated in so many words that in fact the High Court was not so consulted. The respondents have in their return clearly and unequivocally stated that the requisite consultation was made. Even otherwise it is inconceivable that when consultation had admittedly been made with the High Court for the appointment of respondent No. 1 as a Sessions Judge, no such consultation was made for his appointment as a District Judge. The note under the order issued in the name of the Chief

Justice and Judges of the High Court on February 19, 1968, and in one of the endorsements under which the communication was forwarded to the Chandigarh Administration, leave no doubt in my mind that the High Court had expressly approved of the said appointment of respondent No. 1 not only as Sessions Judge, but also as District Judge of Chandigarh. It is, therefore, needless to refer in any detail to the judgment of the Supreme Court in *Chandra Mohan* v. *State of Uttar Pradesh and others* (2), to which reference was made by Mr. Khoji to show that the exercise of the power of appointment of a District Judge by the Governor is conditioned by his consultation with the High Court, that is to say, the Governor can appoint a person to the post of District Judge only in consultation with the High Court and not otherwise. Neither the above-said proposition of law was disputed nor can it indeed be disputed. Any appointment of a District and Sessions Judge made by a Governor without consulting the High Court would be wholly illegal and void. But as already found by us, the appointment of respondent No. 1 as District Judge of Chandigarh was in consultation with the High Court, and is, therefore, completely immune to the attack made on that appointment in this behalf by the petitioner.

(8) It was then contended by counsel that the impugned appointment had not in fact been made even by the Chief Commissioner of Chandigarh. The allegation of the petitioner made in the last sentence of sub-paragraph (d) of paragraph 5 of the writ petition in this behalf has been categorically denied in the corresponding paragraph of the return filed by respondents Nos. 2 and 3. In any event, it is needless to dilate on this point as Sardar Abnasha Singh, the learned counsel for respondents Nos. 2 and 3, fairly and frankly placed before us the original relevant record of the Chandigarh Administration relating to the disputed appointment, which record shows that when the proposal for the appointment of Mr. Manmohan Singh Gujral as District and Sessions Judge, Chandigarh, originally emanated, his personal file was sent by this Court to the Chandigarh Administration which was seen by Shri Damodar Dass, Home Secretary, who made the following note in this respect on February, 17, 1968 :—

> "Placed below is Shri Monmohan Singh Gujral's annual confidential remarks. The Registrar, High Court, told

(2) A.I.R. 1956 S.C. 1987.

me that the last report given by Shri Gurnam Singh, ex-Chief Minister, Punjab was 'outstanding'. The record of the officer seems to be all right. If C. C. agrees we may accept him in place of Shri Jasmer Singh, present District and Sessions Judge, Union Territory."

When the above note was marked to Shri M. S. Randhawa, the then Chief Commissioner of the Union Territory of Chandigarh, he wrote on the file in his own handwriting:—

"I agree.

M. S. Randhawa

19 February, 1968."

It was after the above-said order of the Chief Commissioner himself that Shri Shiv Charan Dass Bajaj, Law Secretary, gave the following direction in the file:—

"notifications with regard to appointment of Shri Manmohan Singh Gujral as District Judge for Chandigarh District and as Sessions Judge of Chandigarh Sessions Division are placed below for favour of signatures of Home Secretary."

As already stated, the relevant notifications were thereafter issued in due course. In the face of this record, it is impossible to hold, as contended by the learned counsel for the petitioner, that respondent No.1 was in fact appointed by Shri Damodar Dass, the then Home Secretary to the Chandigarh Administration, and that the Chief Commissioner himself did not appoint him.

(9) The remaining two submissions of Mr. Khoji are so interlinked that they have to be dealt with together. The argument of the learned counsel relating to those submissions is this. Clause (1) of Article 233 vests the authority to appoint a District Judge in the Governor in contra-distinction to the State Government. Governor and State Government are not the same things. The Constituent Assembly, while framing the Constitution, deliberately avoided using the expression "State Government" in Article 233(1) of the Constitution and used the word "Governor" so as to make it clear that it is the Governor in his individual judgment who has to appoint a District Judge and did not on the advice of his Ministers. In respect of the Union Territory of Chandigarh, the powers of the Governor

under the Constitution are vested in the President of India. It is open to the President of India to delegate all or any of his functions in connection with the governance of a Union Territory to the Administrator of that territory in exercise of his powers under Article 239 of the Constitution. The only delegation of authority which has been made by the President of India under clause (1) of Article 239 of the Constitution in favour of the Administrator of the Union Territory of Chandigarh is by virtue of notification, dated November 1, 1966 (Annexure 'B') to discharge the powers and functions of the "State Government" under any law in force Chandigarh immediately before the first day of November, 1966. Whereas the powers of the State Government, in respect of the Union Territory which vest in the Central Government, have been so delegated to the Administrator, that is, to the Chief Commissioner of Chandigarh, powers of the Governor which vest in the President of India have not been so far delegated to the Chief Commissioner of Chandigarh. The Chief Commissioner had, therefore, no authority to appoint the District Judge of Chandigarh.

(10) The central point around which the web of these arguments is woven is that "Governor" in clause (1) of Article 233 of the Constitution is equated to "Governor in his individual capacity" and not as the mere constitutional head of the State in whose name the Ministers pass all executive orders. In the Government of India Act, 1935, a distinction was maintained between the exercise of executive authority by the Governor-General and by the Governors either in their respective individual judgment (i.e., in their discretion) or with the aid and advice of their respective Councils of Ministers. Part of that distinction has been retained in the Constitution. It has also been made clear by their Lordships of the Supreme Court that there are certain constitutional functions of the President of India which cannot be called the functions of the Union and cannot, therefore, be delegated as such. In *Jayantilal Amratlal Shodhan* v. *F. N. Rana and others* (3), one of the questions that arose for decison was about the field in which clause (1) of Article 258 of the Constitution operates. Article 258(1) authorises the President of India to entrust either conditionally or uncondtionally functions, in relation to any matter to which the executive power of the Union extends, to a State Government or to its officers with the consent

(3) A.I.R. 1964 SC. 648.

of the Government of that State. While discussing the scope of Article 258(1) of the Constitution, the Supreme Court succinctly brought out a list of the functions or powers of the President of India contained in the various provisions of the Constitution which are not the powers of the Union Government but are vested in the President by the Constitution and are incapable of being delegated or, entrusted to any other body or authority. Power to promulgate ordinances under Article 123, to suspend the provisions of Articles 268 to 279 during an emergency, to declare failure of the Constitutional machinery in States under Article 356, to declare a financial emergency under Article 360, to make rules under Article 309, the power to appoint Judges of the Supreme Court and of the High Courts under Articles 124 and 217 respectively, the power to appoint Committees of Official Languages under Article 344, the appointment of Commission to investigate the conditions of backward classes under Article 340, the appointment of Special Officer for Scheduled Castes, Tribes under Article 338, etc., were held to be the constitutional powers of the President which may not be delegated or entrusted to any other body or officer as they do not fall within Article 258. The Supreme Court made it clear that it would be an obvious fallacy to say that the limited content of Article 258(1) in the abovementioned respect is due to the very nature of the powers conferred on the President by the Articles referred to above. It was emphasised that the aforesaid powers cannot be delegated under Article 258(1) "because they are not the powers of the Union and not because of their special character". This is because of the wording of Article 258(1) itself which restricts the scope of the power to delegate under that clause the functions in relation to only such matters "to which the executive power of the Union extends." It was, therefore, brought out in the judgment of the Supreme Court in the case of *Jayantilal Amratlal Shodhan* (supra) (3) that there is a difference between "the executive power of the Union" on the one hand and the constitutional powers of the President of India which also are executive in nature. Counsel wants us to extend the analogy of the observations of the Supreme Court (regarding the distinction between the two kinds of functions of the President of India) in *Jayantilal Amratlal Shodhan's case* (3) to the institution of Governor also, and to hold that matters to which the executive power of the State Government extends are different from some of the special constitutional functions allocated to the Governor by certain provisions of the Constitution. It is argued that if we were to substitute the Governor

in place of the President, and substitute Article 213 in place of Article 123 (relating to the power to issue ordinances), and Article 233 in place of Article 217 (relating to the appointment of District Judges on the one hand and High Court Judges on the other), the observations of the Supreme Court would as much apply to the Governor, and that, therefore, we should hold that the expression "Governor" has been used in Article 233(1) of the Constitution to denote the Governor in his individual judgment as distinguished from the Governor as the constitutional head of the State; in which case, it is submitted by counsel, the expression "State Government"; would have been used by the Constituent Assembly. The observations of the Division Bench of this Court in the case of *Rao Birinder Singh* v. *The Union of India and others* (4) following the judgment of the Supreme Court in *Jayantilal Amratlal Shodhan's* (3) *case* have also been relied upon by Mr. Khoji. In that case Mehar Singh, C.J. (with whom I agreed) held that the function of the President of India under Article 356 is not the executive power of the Union referred to in Articles 52, 73 and 77. Counsel then referred to the judgment of the Supreme Court in *Jyoti Prokash Mitter* v. *The Hon'ble Mr. Justice H. K. Bose, Chief Justice of the High Court, Calcutta, and another* (5) wherein it was held that clause (3) of Article 217 of the Constitution vests the jurisdiction to determine the question about the age of a Judge exclusively in the President and the said function cannot be exercised by the Home Ministry in the name of the President of India or by any Court.

(11) Strength for this particular submission is also sought to be derived by Mr. Khoji, from the legislative history behind the enactment of Article 233. The said legislative history has been brought out in substantial detail by their Lordships of the Supreme Court in the *State of West Bengal and another* v. *Nripendar Nath Bagchi,* (6). After referring to the 1912 Report of the Aslington's Commission and the provisions of sub-section (2) of section 96-B of the Government of India Act, 1919, and to section 107 of the said Act, and after pointing out that the powers of the High Court under the 1919 Act did not include the power of appointment, promotion, transfer or control

(4) I.L.R. (1969) 1 Pb. & Hry. 176=A.I.R. 1968 Pb. & Hry: 441:
(5) A.I.R. 1965 S.C. 961.
(6) A.I.R. 1966 S.C. 447.

of District Judges, their Lordships of the Supreme Court referred to certain extracts from the speech of Marquis of Salisbury, and then proceeded to quote in extenso the relevant recommendation of the Joint Parliamentary Committee (paragraph 337 at page 201) relating to appointments to the subordinate judiciary in India. After quoting from the said report, the Supreme Court proceeded to observe as follows :—

> As a result, when the Government of India Act 1935 was passed it contained special provisions (sections 254-256 already quoted) with regard to District Judges and the subordinate judiciary. It will be noticed that there was no immediate attempt to put the subordinate criminal magistracy under the High Courts but the posting and promotion and grant of leave of persons belonging to the subordinate judicial service of a province was put in the hands of High Court though there was right of appeal to any authority named in the rules and the High Courts were asked not to act except in accordance with the conditions of the service purescribed by the Rules. As regards the District Judges the posting and promotions of a District Judge was to be made by the Governor of the Province exercising his individual judgment and the High Court was to be consulted before recommendation to the making of such an appointment was submitted to the Governor. Since section 240 of the Government of India Act, 1935, provided that a civil servant was not to be dismissed by an authority subordinate to that which appointed him, the Governor was also the dismissing authority. The Government of India Act, 1935, was silent about the control over the District Judge and the subordinate judicial services. The administrative control of the High Court under section 224, over the courts subordinate to it extended only to the enumerated topics and to superintendence over them. The independence of the subordinate judiciary and of the District Judges was thus assured to a certain extent, but not quite.
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> When the Constitution was being drafted the advance made by the 1935, Act, was unfortunately lost sight of. The draft Constitution made no mention of the special provisions, not even similar to those made by the Government of India Act, 1935, in respect of the subordinate judiciary.

If that had remained, the judicial services would have come under Part XIV dealing with the services in India. An amendment, fortunately was accepted and led to the inclusion of Articles 233 to 237. These articles were not placed in the Chapter on services but immediately after the provisions in regard to the High Courts. The articles went a little further than the corresponding sections of the Government of India Act."

Section 254(1) of the Government of India Act, 1935, which was enacted by the British Parliamentary in pursuance of the recommendations of the Joint Parliamentary Committee referred to above was in the following terms :—

"Appointments of persons to be, and the posting and promotion of, district judges in any Province shall be made by the Governor of the Province, exercising his individual judgment, and the High Court shall be consulted before a recommendation as to the making of any such appointment is submitted to the Governor."

Clause (c) of sub-section (1) of section 9 of the Indian Independence Act, 1947, passed by the British Parliament provided that the Governor General shall by order make such provision as appears to him to be necessary or expedient for making omissions from, additions to and adaptations and modifications of Government of India Act, 1935, in its application to the separate new Dominions of India and Pakistan. This as to provide for provisional adaptation of the 1935 Act, till final provision could be made in accordance with the law made by the Constituent Assembly of the Dominion concerned. In exercise of the powers conferred by section 9(1), (c), of the Indian Independence Act, the Governor General promulgated the India (Provisional Constitutional), Order, 1947. Sub-clause (2), of clause 3, of the said Order provided as follows :—

"The following expressions shall be omitted wherever they occur, namely; 'in his discretion,' 'acting in his discretion' and 'exercising his individual judgment."

In pursuance of the said provisional adaptation, the words "exercising his individual judgment" qualifying the authority of the Governor in sub-section (1), of section 254 of the Government of India Act, were omitted. It appears that it was because of this situation that

the Supreme Court observed in the *State of West Bengal and another*, v. *Nripendra Nath Bagchi*, (supra), (6), that if the Constituent Assembly had not added Articles 233 to 237, to the draft Constitution, it would have gone back upon the solitary step taken by the British Parliament in 1935 Act, by leaving the appointment of District Judges to the Governor in exercise of his individual judgment. The submission of Mr. Khoji is that the above quoted provision in the 1935 Act, vested the power to appoint a District Judge in the Governor "exercising his individual judgment," so as to keep this important matter relating to the judiciary completely out of hands of the Ministers; and that when the Supreme Court has observed (in the abovequoted passage from the judgment in the *State of West Bengal and another*, v. *Nripendra Nath Bagchi*, (supra), (6), that Articles 233 to 237 of the Constitution "went a little further tha nthe corresponding sections of the Government of India Act" the minimum that can be said is that the Constitution of India has not gone back on the step taken by the British Parliament while enacting section 254, of the Government of India Act in the matter of vesting the authority to appoint District Judges in the Governors in their individual judgment and not in the State Governments; and that the India (Provisional Constitution), Order, 1947, was only an interim measure to last till the making of the Constitution.

(12) Keeping in view the legislative history of the provisions of Article 233(1), of the Constitution and the history behind the enactment of section 254, of the Government of India Act, 1935, as well as the observations of their Lordships of the Supreme Court in the *State of West Bengal and another* v. *Nripendra Nath Bagchi* (supra), (6), and the scope of difference between certain specified constitutional powers of the Governors on the one hand and the executive powers of the State Government headed by the Governor on the other as brought out in the case of the President of India by the Supreme Court in *Jayantilal Amratlal Shodhan* v. *F. N. Rana and others*, (3), it seems that in States administered by a Governor with the aid of Council of Ministers, the Governor himself is the appointing authority named by the Constitution and that the functions assigned to him by clause (1), of Article 233 of the Constitution cannot be performed by the State Government merely in the name of the Governor; but so far as the Union Territories in which there is no Council of Ministers are concerned, the position is different. The argument of Mr. Khoji to the effect that the intention behind the particular phraseology used in Article 233 of the

Constitution is to keep the Ministers out of the appointment of District Judges as much as possible, would not apply to such a Union Territory as no question of any ministerial interference can arise and it is the President of India who is to either administer the territory himself or through an Administrator to the extent to which he may delegate his functions to such Administrator.

(13) This takes me to the question as to who is the Governor in the case of the Union Territory of Chandigarh. In view of the authoritative pronouncement of their Lordships of the Supreme Court in *Satya Dev Bushahri* v. *Padam Dev and others*, (7), this question does not present any difficulty. Their Lordships made it clear in the aforesaid case that the President of India who is the executive head of Part 'C' States (as the Union Territories were then called), does not function as the executive head of the Central Government, but as the head of the State under powers specifically vested in him under Article 239. The authority conferred under Article 239 of the Constitution to administer Union Territories has not the effect of converting those States into Central Government, and according to the aforesaid pronouncement of the Supreme Court, the President of India occupies in regard to the Union Territories a position analogous to that of Governor in Part 'A' States, and that of a Rajparmukh in what used to be part 'B' States. Their Lordships observed that though Part 'C' States corresponding to the present Union Territories are centrally administered under the provisions of Article 239, they do not cease to be States, and do not get merged with the Central Government. The result of the pronouncement of the Supreme Court is that functions enjoined by the Constitution on the Governor of a State have normally to be performed by the President of India in case of a Union Territory. This does not, however, mean that the President of India cannot delegate those functions. Article 239(1), of the Constitution specially authorises the President of India to administer a Union Territory through an Administrator to be appointed by him to such extent as he thinks fit. The President of India has in fact issued the notification under the abovesaid provision (Annexure 'B' to the writ petition), delegating functions of the State Government which also vest in him in respect of a Union Territory to the Administrator of the Union Territory of Chandigarh, who has been designated as the

(7) A.I.R. 1954 S.C. 587.

Chief Commissioner of Chandigarh. I have already held that the appointment of respondent No. 1 as District Judge of Chandigarh was made personally by the then Chief Commissioner of Chandigarh under his own signature in consultation with the High Court As the administration of a Union Territory vests under Article 239 of the Constitution in the President of India, the powers of the State Government as well as of the Governor in respect of a Union Territory have for all practical purposes to be exercised either by the President of India or by his delegate to the extent to which such powers may be delegated under Article 239(1), of the Constitution.

(14) Mr. Khoji then submitted that in as much as the Government of Union Territories Act, (20 of 1963), does not apply to the Union Territory of Chandigarh (*vide* definition of Union Territory contained in in section 2(h) of the said Act), and order of the Chief Commissioner of the Union Territory of Chandigarh cannot be authenticated under section 46 of that Act, and even if the President of India has by rules of business or otherwise delegated the power to authenticate the order of the Chief Commissioner to the Home Secretary, the effect of non-application of section 46 of the Parliament Act, 20 of 1963, is that such orders of the Chief Commissioner are not immune to an attack about their not having been made by the Chief Commissioner himself or by the President of India. This question of authentication does not really arise in the present case as the appointment of respondent No. 1, was made by the Chief Commissioner himself and not merely in his name.

(15) Sardar Abnasha Singh, the learned counsel for the respondents, submitted that the case of Union Territory of Chandigarh should be treated on an entirely different level than of other Union Territories in as much as it is a newly formed State carved out by section 4 of the Punjab Reorganisation Act. The learned counsel for the respondents referred to section 91 of the Punjab Reorganisation Act, which is in the following terms :—

> "The Central Government, as respects the Union Territory of Chandigarh or the transferred territory, and the Government of the State of Haryana as respects the territories thereof may, by notification in the Official Gazette, specify the authority, officer or person who, on and from the appointed day, shall be competent to exercise such

functions exercisable under any law in force on that day as may be mentioned in that notification and such law shall have effect accordingly,"

and argued that it is the Central Government which has the power in respect of the Union Territory of Chandigarh to specify the authority, officer or person who on and with effect from November 1, 1966 (the appointed day), shall be competent to exercise such functions as are exercisable under any law in force on that day as may be mentioned in the notification issued by the Central Government in that behalf. The argument of Sardar Abnasha Singh is that the Central Government having issued the notification (Annexure 'B'), naming the Chief Commissioner of Chandigarh as the officer who would exercise all the functions of the State Government, the appointment of respondent No. 1, by the Chief Commissioner is fully authorised. Even irrespective of the provisions of section 91 of the Punjab Reorganisation Act, the President of India could and has delegated his powers in respect of the administration of Union Territory of Chandigarh to the Chief Commissioner under Article 239(1) of the Constitution. We are, therefore, unable to find any invalidity in the appointment of respondent No. 1 as District Judge of Chandigarh.

(16) No other point having been argued before us in this case, the writ petition fails and is dismissed, but in view of the nature of questions raised and the peculiar circumstances of the case, we make no order as to costs of these proceedings in this Court.

S. B. CAPOOR, J.—I agree.

K. S. K.

REVISIONAL CIVIL

Before Mehar Singh, C. J.

KIDAR NATH,—*Petitioner*

versus

SHRIMATI KARTAR KAUR,—*Respondent*

C. R. 32 of 1968

December 12, 1968

East Punjab Urban Rent Restriction Act *(III of* 1949)—*Section* 13(2)(*ii*) (*a*)—***Demised property let for a fixed term—Rent-note entitling the tenant to sub-let the property—Such tenant—Whether can sub-let after the expiry of the fixed term.***