FULL BENCH

Before Harbans Singh, C.J., D. K. Mahajan, R. S. Narula, Ranjit Singh Sarkaria and Bal Raj Tuli, JJ.

NARENDER SINGH RAO,—*Petitioner*

versus

THE STATE OF HARYANA, ETC.,—*Respondents.*

Civil Writ No. 2147 of 1973

November 6, 1973.

Constitution of India (1950)—*Articles* 233, 235 *and* 311—*Punjab Superior Judicial Service Rules* (1963)—*Rule* 10—*General Clauses Act* (X *of* 1897)—*Section* 16—*Appointment of a District Judge on probation—Confirmation after the period of probation—Power of—Whether vests in the Governor of the State—High Court—Whether the only authority to recommend such confirmation—Order of non-confirmation of a probation District Judge passed by the Governor without effective consultation of the High Court and based on enquiry conducted otherwise than through or with the concurrence of the High Court—Whether violative of Articles* 233 *and* 235 *of the Constitution—Punjab Superior Judicial Service Rules* (1963)—*Rule* 10—*Whether* ultra vires *Article* 235 *of the Constitution.*

Held, (by majority per Hon'ble Chief Justice, Narula and Sarkaria, JJ., Mahajan and Tuli, JJ. *Contra.*), that clause (1) of Article 233 of the Constitution expressly gives the power of making appointments, postings and promotions of persons to be District Judge to the Governor of the State concerned, acting in consultation with the High Court. Such appointments and postings may be made either by direct recruitment from the Bar or by promotion from the Judicial Service of the State. Clause (1) of Article 233 takes care of both. The mandate of clause (1) is that in making all such appointments, whether directly or by promotion, the Governor must consult the High Court concerned. Clause (2) is an eligibility clause. It prescribes the qualifications which make a person eligible for direct appointment as a District Judge. Both the clauses of the Article have to be read together. Thus read, it is clear that consultation and recommendation involve the same process of mutual deliberation and exchange of views with regard to individuals between the High Court and the Governor. It is immaterial as to who out of the two authorities initiates the dialogue. If a person is appointed a District Judge on probation by the Governor in consultation with the High Court, his confirmation in the service means nothing different from appointing him on a substantive basis to the cadre of the service on satisfactory completion of his period of probation. The confirmation is the last step in completing and making firm the appointment of a person, initially appointed on probation. Confirmation does not operate at

a post-appointment stage. Applying the principle of section 16 of the General Clauses Act, 1897, it is also clear that the power of appointment vesting in the Governor under Article 233, embraces within its scope the power of dismissal and removal from service, including termination of or dispensing with the services of a probationer. The question of confirmation is inextricably bound up with that of non-confirmation or termination of the service of a probationer. Confirmation and non-confirmation/termination of service are positive and negative of the same power. If the negative aspect of the power viz., the removal or discharge from service, vests in the Governor, it will be anomalous to hold that the positive aspect of the same power should be with some other authority. In the absence of anything in the language of Articles 233 and 235 warranting, expressly or by necessary implication, a contrary interpretation, the authority to appoint a District Judge, on probation, and to confirm that appointment on satisfactory completion of his probation, or to terminate his services in case of unsatisfactory performance, is the Governor.

Held, (per Mahajan and Tuli, JJ. *Contra.*), that the Governor is only concerned when he makes the initial appointment of a District Judge under Article 233 of the Constitution. From that point onwards, the appointee becomes a member of the Superior Judicial Service and his career therein begins under the exclusive and complete control of the High Court. The powers of the Governor from that point onwards *to deal* with the appointee cease for every purpose other than for passing an order making him quit the service by removal or dismissal. The power to remove or dismiss is exercisable under Article 311(2) of the Constitution and not under Article 233 as a part of the power to appoint of the Governor. The power under Article 311(2) of the Constitution can be exercised only on the initiation and recommendation of the High Court which alone has the power to initiate the disciplinary proceedings, hold the enquiry and find a case of dismissal or removal. The Governor on his own cannot do so. Similarly for continuing a probationer District Judge in service, no order is necessary to be passed by the Governor. This is to be done by the High Court alone after satisfying that the work and conduct of the probationer during the period of probation are satisfactory. The power to discharge a probationer from service on the ground that his work and conduct during the period of probation were not satisfactory cannot be given to the appointing authority by virtue of the provisions of section 16 of the General Clauses Act, 1897. That section only talks of 'suspend' or 'dismiss'. It does not take note of discharge from service of a probationer on the basis of unsatisfactory work and conduct or on account of retrenchment or otherwise than by way of punishment or discipline. Such a power is to be gathered from the Service Rules governing the Government employee concerned. The Governor is not at all concerned with confirmation which takes place some time after initial appointment and on the scrutiny of the service record of the probationer so as to find whether his work and conduct have been satisfactory entitling him to continue in service and to confirmation therein. The High Court has both administrative and disciplinary control by virtue of the provisions of Article 235 of the Constitution over the District Judges and the

Courts subordinate thereto which are defined as Judicial Services in Article 235. In order to confirm a member of the Superior Judicial Service on probation during or after the expiry of that period it has to be determined whether his work and conduct have been satisfactory and that can be done only by the High Court which alone knows about it. Confirmation in the service, means the decision by the competent authority as to whether the person on probation deserves to be continued in service or his service should be dispensed with. That decision has to be made on the determination whether his work and conduct during the period of probation have been satisfactory. Such a determination falls within the ambit of administrative and disciplinary control which vests solely in the High Court. Hence the High Court alone has the power to confirm a member of the Superior Judicial Service on probation and the Governor has no say in the matter.

Held, (per Full Bench), that consultation with the High Court under Article 233 of the Constitution is mandatory before the exercise of the power under the Article by the Governor. The control vested in the High Court under Article 235 of the Constitution, read together with the mandate of Article 233 of the Constitution, makes it abundantly clear that the High Court alone is competent to certify/recommend/advise, as to whether or not a probationer has satisfactorily completed the period of probation. The advice given by the High Court is entitled to the highest regard and is not to be received with ill-grace or rejected out of hand, because the High Court alone, in exercise of its powers of control, is in the most suitable position to gauge the work and worth of a Judicial Officer. Though the role of the High Court is advisory and consultative yet, as a matter of healthy practice, sound convention and good administration, the Governor is expected to accept it and make it effective. There is no scope for the Governor to differ from the views expressed by the High Court even if the High Court refuses to supply the material on which it has based its opinion to the Governor. What has to be considered are the views of the High Court and not the material on which they are based. Hence an order of non-confirmation of a probationer District Judge passed by the Governor without effective consultation with the High Court and based on the report of an enquiry conducted otherwise than through or with the concurrence of the High Court, is violative of Articles 233 and 235 of Constitution of India.

Held, (per Mahajan and Tuli, JJ.), that the Governor is only concerned at the stage of initial appointment of a member of Punjab Superior Judicial Service and the High Court with the subsequent judicial career of the person so appointed. The power of confirmation, therefore, must necessarily vest in the High Court. 'Appointment' is not a process which culminates with confirmation nor can the authority to deal with a probationer District Judge at the stage of confirmation be some one other than the High Court. If any rules are framed by the Governor in exercise of his power under Article 309 of the Constitution, in respect of confirmation of a probationer District Judge, the High Court alone shall have to be prescribed as the authirity to decide whethtr to confirm or not to confirm the probationer. If

the rule prescribes the Governor as the confirming authority, it will be *ultra vires* Article 235 of the Constitution. No rules for appointment of District Judges can be made by the Governor under Article 309 of the Constitution. The appointments are to be made by him right from the beginning like the appointments of Judges of the High Courts and Supreme Court and no period of probation for them can be prescribed by any rules, on the satisfactory completion of which confirmation will take place. The appointment of a person to be District Judge is complete when a direct recruit is initiated into the Service and thereafter his work and conduct have to be watched and scrutinised by the High Court to determine his future career in the service. The power of confirming an officer appointed to the Superior Judicial Service on probation pertains to the domain of control and promotion and vests solely in the High Court and the Governor has no say in the matter. The Governor has no jurisdiction to consider whether the probationer has completed the period of his probation satisfactorily or not with a view to decide whether he should be confirmed in the service or not. On this conclusion, rule 10 of Punjab Superior Judicial Service Rules, 1963, is *ultra vires* Article 235 of the Constitution.

Case referred by the Full Bench consisting of Hon'ble Mr. Justice D. K. Mahajan, Hon'ble Mr. Justice R. S. Narula and Hon'ble Mr. Justice Ranjit Singh Sarkaria on 20th August, 1973, to a Larger Bench for decision of important questions of law involved in the case. The Larger Bench comprising of Hon'ble the Chief Justice Mr. Harbans Singh, Hon'ble Mr. Justice D. K. Mahajan, Hon'ble Mr. Justice R. S. Narula, Hon'ble Mr. Justice Ranjit Singh Sarkaria and Hon'ble Mr. Justice Bal Raj Tuli, finally disposed of the above noted Writ Petition on 14th September, 1973.

Petition under Articles 226 and 227 of the Constitution of India praying that an appropriate writ, order or direction be issued directing the Respondents to transmit the records of the case particularly the records pertaining to the final action taken by Respondents Nos. 1 and 2 against the petitioner to this Hon'ble Court in order to enable it to scrutinise the legality and validity of the various orders passed by Respondents Nos. 1 and 2 leading to the passing of the final impugned order dated 21st June, 1973, (Annexure 'J') with a view to quashing the same and also praying that the costs of the petition be allowed against Respondents Nos. 1 and 2.

CIVIL MISC. No. 5288 OF 1973.

Application under section 151, Civil Procedure Code praying that orders be passed for the personal attendance of respondent No. 2 for cross-examination in this Hon'ble High Court at such stage as this Hon'ble Court deems just and proper.

CIVIL MISC. No. 5289 OF 1973.

Petition under section 151 of the Civil Procedure Code praying that orders be passed directing respondents 1 and 2 to produce the following files

and to place them on the record of the High Court during the duration of the hearing of the writ petition, with directions to give inspection of the same to the petitioner before and during the hearing of the writ petition:—

(1) *file of the Haryana Government/Chief Minister, Haryana, containing correspondence with Shri H. R. Gokhale, Minister of Law and Justice and with the Ministry of Law, Government of India, relating to the petitioner's case as also concerning the amendments in Punjab Superior Judicial Service Rules as applicable to the State of Haryana from August, 1971, up-to-date.*

(2) *File of correspondence between the Government of Haryana/Chief Minister, Haryana and the High Court/Hon'ble the Chief Justice of the High Court for Punjab and Haryana on both the above subjects, namely, regarding service of the petitioner and amendment of the rules.*

(3) *Personal file of the petitioner with the Government containing:*

(i) *complaints and allegations against the petitioner and the orders of the Government passed thereon.*

(ii) *report of the Director, Special Enquiry Agency, and the evidence recorded by him as also the Government orders thereon.*

(iii) *personal file of the petitioner with the High Court including report of Justice Gurnam Singh and the evidence recorded by him.*

(iv) *the Administrative file with the Haryana Government relating to the appointment of the petitioner :—*

(a) *as Assistant Advocate-General; and*

(b) *the file regarding honorarium settled for the petitioner for conducting Kairon Murder case.*

D. N. Awasthy, Advocate with K. P. Bhandari, and A. C. Jain, Advocates, *for the petitioner.*

J. N. Kaushal, Advocate-General (Haryana), with C. D. Dewan, Additional Advocate-General (Haryana), D. S. Lamba, Deputy Advocate-General (Haryana), H. N. Mahtani, Assistant Advocate-General (Haryana), and Ashok Bhan and Anand Swaroop, Advocates with U. S. Sahni and I. S. Balhara, Advocates, *for the respondents.*

JUDGMENT

R. S. SARKARIA, J.—(1) This is a petition under Articles 226/227 of the Constitution, challenging an order, dated June 21, 1973, of the Governor of the State of Haryana, whereby the petitioner was reverted from the post of the District and Sessions Judge to his substantive post of District Attorney with effect from June 23, 1973.

(2) The undisputed facts are, that the petitioner, Shri N. S. Rao, was holding the post of substantive District Attorney in the State of Haryana in June, 1970. He was subsequently promoted and posted as officiating Assistant Advocate-General and was working in that capacity when by an order, dated June 23, 1970, (copy Annexure R. 1/1), the Governor of Haryana, on the recommendation of the High Court, appointed him as the District/Additional District and Sessions Judge on probation, in a substantive vacancy, in the cadre of the Superior Judicial Service. That order, *inter alia*, provided :

> "In all matters pertaining to seniority, probation, etc., he will be governed by the provisions of the Punjab Superior Judicial Service Rules, 1963."

(3) In pursuance of that order, the petitioner took over as Additional District and Sessions Judge on July 7, 1970. Under rule 10 of the Punjab Superior Judicial Service Rules (hereinafter referred to as the '1963 Rules'), applicable to the petitioner, he, being a direct recruit, had to remain on probation for a period of two years, which period could be so extended as not to exceed a total of 3 years. Thus, he completed two years of probation on the 7th July, 1972.

(4) On September 5, 1972, Shri N. S. Rao was posted by the High Court as District and Sessions Judge, Karnal. On July 11, 1972, a complaint by one Mangat Rai Gauba, against the petitioner was received by Hon'ble the Chief Justice. It was followed by another complaint, dated August 2, 1972. Enquiry into this complaint was entrusted to Mr. Justice Gurnam Singh, who went to the spot, recorded evidence, made an enquiry and submitted his report on January 17, 1973, which was considered by the Judges in a meeting held on March 15, 1973, and it was found that the allegations against Shri N. S. Rao, made in the complaint by Mangat Rai Gauba, had not been substantiated.

(5) On October 13, 1972, the Deputy Secretary to Government, Haryana, in the Services Department, wrote a letter to the Registrar

of the High Court, drawing attention to the fact that the two years' probation of Shri N. S. Rao had expired on July 7, 1972, and soliciting the views of the High Court as to whether Shri Rao had completed the probation period satisfactorily and was considered suitable for confirmation, or whether it was considered desirable to extend the probation period. The Deputy Secretary, on February 13, 1973, wrote another letter (copy Annexure R. 3/A) to the Registrar, in which he referred to his previous letter of October 13, 1972, urging the High Court to intimate their views with regard to this matter within 15 days from the receipt thereof, along with the complete confidential record/reports regarding the work and conduct of Shri Rao. The Registrar, High Court, sent an interim reply by his letter, dated February 28, 1973, that the matter was still under consideration of High Court. On March 8, 1973, the Deputy Secretary to Government, Haryana, wrote another urgent letter (copy Annexure R. 3/B), reiterating its request that the High Court should send its views about the satisfactory or unsatisfactory completion of the initial probation period by Shri N. S. Rao. They also reminded the High Court that they had sent a complaint under cover of their letter, dated September 25, 1972, in which serious allegations had been made against this officer. They further requested that the result of the enquiry, including the report of the Officer deputed for the enquiry, should be made available to the State Government along with the record about the work and conduct of Shri Rao, so that a decision could be taken before Shri Rao completed the maximum period of 3 years' probation on July 7, 1973.

(6) While the State Government was repeatedly urging the High Court to send its views along with the record regarding the work and conduct of the probationer, Shri Rao, the matter was considered in a meeting of the Judges, on the administrative side, held on March 30, 1973. Since the High Court was of the opinion that the power to confirm a District Judge on probation vests in the High Court, a decision was taken in that meeting, confirming Shri N. S.. Rao as District and Sessions Judge with effect from March 30, 1973. In pursuance thereof, Notification No. 110-GAZ-VI. F9, dated April 18, 1973, was issued by the High Court, which was published in the Haryana Government Gazette of May 1, 1973. At a subsequent meeting held on May 4, 1973, the Judges took another decision, whereby they changed the date of this confirmation from March 30, 1973 to July 7, 1972. Five other promoted officers, namely, Sarvshri Mool Raj Sikka, B. S. Yadav, V. P. Aggarwal, A. N. Aggarwal and S. R. Bakhshi,

were also confirmed in the cadre of the Superior Judicial Service with effect from July 8, 1972, i.e., one day after Shri Rao's confirmation. In this connection, the High Court issued Notification No. 124-GAZ/ VI. F. 10, dated May 4, 1973, which was published in the Haryana Government Gazette, dated May 15, 1973.

(7) Thereafter, the Registrar, High Court, by his letter, dated April 10, 1973 (copy Annexure R. 3/C) informed the Government that the Hon'ble the Chief Justice and Judges of the High Court were "of the opinion that the matter of confirmation of Shri N. S. Rao and other promotees from the H.C.S. (Judicial) lies with the High Court and not with the State Government, and Rule 10(2) of the Superior Judicial Service Rules is *ultra vires* the provisions of Articles 233 and 235 of the Constitution and has, therefore, to be ignored". The High Court referred to the various rulings of the Supreme Court to support their view point. In the penultimate paragraph of the letter, it was said:

> "It has been decided that Shri N. S. Rao, having successfully completed the period of his probation, is confirmed in the post of District and Sessions Judge with effect from 30th March, 1973. A regular notification is being issued, a copy of which will be forwarded to you for information."

(8) In the last paragraph of the letter, the Government were informed that the allegations made by Mangat Rai Gauba in his complaint against Shri N. S. Rao, had not been substantiated. The Government were further told that since the matter was within the exclusive jurisdiction of the High Court, copy of the Enquiry Report concerning that complaint could not be supplied to them.

(9) The Government then by their letter, dated April 19, 1973 (copy Annexure R. 1/11) informed the High Court that they did not agree with the aforesaid opinion of the High Court as to its power of confirmation. The Government further maintained that it was the Governor, who had the jurisdiction to confirm or not to confirm a District Judge. The High Court was requested to reconsider the matter and withhold the notification confirming the petitioner. They again requested the High Court to supply the service record of the petitioner and a copy of the Enquiry Report in order to enable them to see the basis on which the findings were arrived at by the Enquiry Officer.

(10) The Registrar, High Court, then wrote a letter, dated May 4, 1973 (copy Annexure R. 1/12) with reference to several letters of the Haryana Government, reiterating the stand taken by the High Court. He refused to supply the report of the enquiry conducted by Mr. Justice Gurnam Singh, and other service record of Shri Rao to the Government.

(11) The Government then by their letter, dated May 26, 1973 (copy Annexure R. 1/13) informed the High Court that the State Government did not recognise the orders of confirmation issued by the High Court, as valid, and had decided to consider them as non-existent. They further said that Shri Rao was still under the extended period of probation and his suitability for confirmation or otherwise had still to be adjudged by the Governor after considering the complete record regarding his work and conduct, as also the Enquiry Officer's report.

(12) The Government then deputed Kanwar Randip Singh, Director of the Special Enquiry Agency, Haryana, to enquire into the allegations made against the petitioner by Mangat Rai Gauba in his complaint, dated August 2, 1972, and into the allegations made by Shri Gur Parshad, District Attorney, Karnal, in some communication, dated June 12, 1972, addressed by him to the Legal Remembrancer, Haryana, that the petitioner did not prepare faithful record of the evidence recorded by him. Kanwar Randip Singh, then (sometime in May, 1973) went to Karnal and made an enquiry and submitted his report to the State Government. The Deputy Secretary to the Government then wrote a D.O. letter, dated June 1, 1973, (copy Annexure R. 1/14) to the Registrar, High Court. In this letter, he (after reiterating the Government stand and the apprehension that legal difficulties might arise if a decision with regard to the confirmation or otherwise of Shri Rao was not taken before the 7th July, 1973, the date on which he would complete his maximum probation period of 3 years, and explaining why the Government was compelled to get a confidential enquiry made through their own Agency) informed the High Court that certain allegations made in the said complaints had been proved against Shri Rao. In conclusion, it was held:

> "The State Government are of the opinion that in view of the probation period of Shri N. S. Rao, having been found to be unsatisfactory, he is not fit to be retained on the post

of District/Additional District and Sessions Judge and since he holds lien on the post of District Attorney, he should be reverted back to his substantive post of District Attorney forthwith.

Since the matter is of a very urgent nature for reasons explained in para 2 and the High Court is also closing for vacation, I am to request that the matter may be placed before the Hon'ble Chief Justice and Judges of the High Court immediately, so that the views of the High Court can be made available to the Governor before the High Court adjourns for vacation."

(13) The Deputy Secretary again wrote a D. O. letter, dated June 12, 1973, to the Registrar that if the views were not received within a week, the State Government would have no other alternative, but to take a final decision without waiting any further. As the High Court was closed for vacation, an interim reply was sent by the Registrar to the Governor, stating that the matter was under consideration of the High Court and final reply would be sent on the reopening of the High Court, i.e., after 15th July, 1973.

(14) Without waiting further, the Governor, accepting the advice of the Council of Ministers, in purported exercise of his powers under Article 233 of the Constitution read with Rule 10(2) of the 1963 Rules, passed the impugned orders, reverting Shri N. S. Rao from the Superior Judicial Service to his substantive post of District Attorney.

(15) These orders are being impugned by the petitioner on various grounds, which may be re-arranged as under :

I. *Legal.*

(i) That the confirmation being a matter of 'control' vested in the High Court under Article 235 of the Constitution, the petitioner had been validly confirmed by the High Court, and the Governor/Government had no jurisdiction to pass the impugned order: Rule 10(2) of the 1963 Rules, in pursuance of which the impugned orders were passed, is null and void, being in conflict with Article 235.

(ii) That even if under Article 233 of the Constitution read with Rule 10 of the 1963 Rules, the Governor had the

power to pass a formal order of confirmation, then also it was the High Court alone which was competent to certify/ recommend and advise the Governor about the fitness or otherwise of the petitioner to be confirmed, and such advice or certification was binding on the Governor.

(iii) In any case, in view of the mandate of Article 233 and Rule 10 of the 1963 Rules itself, no order dispensing with services of the petitioner could be passed without proper and effective consultation with the High Court. The impugned orders were made without such consultation. In making it, the Governor was influenced by extraneous considerations, viz., (a) the advice of the Council of Ministers and (b) the report of the Director of the Special Enquiry Agency.

(iv) That the impugned orders are void, as no notice in compliance with the mandate of Rule 9 of the Punjab Civil Service (Punishment and Appeal) Rules, 1952 (hereinafter referred to as the 'Appeal Rules') was issued to the petitioner.

(v) That the impugned orders operate as a punishment and are violative of Article 311 of the Constitution and the concepts of natural justice, inasmuch as no opportunity was afforded to the petitioner to defend himself and to explain the allegations made at his back.

(vi) That the amendments of the 1963 Rules, promulgated and published in the Haryana Government Gazette on April 21, 1972, were unconstitutional, as they were made without effective consultation with the High Court. The amended rule regarding seniority is unconstitutional, inasmuch as fixation of seniority is a matter of control of the High Court under Article 235 of the Constitution.

II. *Factual—Regarding* mala fides.

(i) That the amendments to the 1963 Rules have been made and given retrospective effect from 1st April, 1970, maliciously with a view to injure the rights of the petitioner.

(ii) That the impugned orders are the result of malice, which Shri Bansi Lal, Chief Minister, Respondent 2, had come to harbour against the petitioner.

(16) Separate written statements have been filed on behalf of Respondent 1 (State of Haryana) Respondent 2 (Shri Bansi Lal, Chief Minister), and Respondent 3 (Registrar of the High Court). In his affidavit, Shri Bansi Lal, Respondent 2, has emphatically traversed the allegations of *mala fides* made against him by the petitioner. On all the legal points, also, Respondents 1 and 2 have joined issue with the petitioner. The stand of the Registrar, High Court, in his written statement, with regard to the points of law involved, is, more or less, the same as that of the petitioner.

(17) The first and the main question that falls to be determined, is: "who is the authority competent to confirm a District Judge in the cadre of the Superior Judicial Service of the State?" This question further resolves itself into the issue: "Is such confirmation a process of 'appointment' falling within the purview of Article 233, or a matter of 'control' vesting in the High Court under Article 235 of the Constitution?

(18) Rule 10 of the 1963 Rules [the validity of sub-rule (2) of which has been questioned], reads:

> "10. *Probation* (1) Direct recruits to the Service shall remain on probation for a period of two years, which may be so extended by the Governor in consultation with the High Court, as not to exceed a total of three years.
>
> (2) On the completion of the period of probation the Governor may, in consultation with the High Court, confirm a direct recruit on a cadre-post with effect from a date not earlier than the date on which he completes the period of probation.
>
> (3) If the work or conduct of a direct recruit has, in the opinion of the Governor, not been satisfactory, he may, at any time, during the period of probation or the extended period of probation, if any, in consultation with the High Court, and without assigning any reason, dispense with the services of such direct recruit."

(19) The Constitutional provisions relevant for our purpose, are these:

> "233. *Appointment of district judges.*—(1) 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.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

"235. *Control over subordinate courts.*—The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law."

(20) It was contended by Mr. Anand Swaroop Mittal that the appointment of direct recruits to the Superior Judicial Service is governed by clause (2), while that of promoted officers by clause (1) of Article 233, and, that once the High Court recommends a direct recruit for appointment, even on probation, to the service and that recommendation is accepted, the powers of the Governor cease and the question of further consultation between the High Court and the Governor for confirming that appointment does not arise, clause (1) being inapplicable to direct recruits.

(21) The contention is fallacious. Clause (1) of Article 233 of the Constitution expressly gives the power of making appointments, postings and promotions of persons to be District Judges to the Governor of the State concerned, acting in consultation with the High Court. Such appointments and postings may be made either by direct recruitment from the Bar or by promotion from the Judicial Service of the State. As pointed out in *State of Assam* v. *Kuseswar*, (1) clause (1) of Article 233 takes care of both. The mandate of clause (1) is that in making all such appointments, whether directly or by

(1) A.I.R. 1970 S.C. 1616.

promotion, the Governor must consult the High Court concerned. Clause (2) is an eligibility clause. It prescribes the qualifications which make a person eligible for direct appointment as a District Judge. Such qualifications are: (i) that the candidate has been, for not less than 7 years, an Advocate or a pleader, and (ii) he is recommended by the High Court for appointment. Both the clauses of the Article have to be read together. Thus read, it will be clear that consultation and recommendation involve the same process of mutual deliberation and exchange of views with regard to individuals between the High Court and the Governor. It is immaterial as to who out of the two authorities initiates the dialogue.

(22) Now let us consider the meaning of the term 'confirmation' Its ordinary grammatical meaning in relation to appointments or like matters, involves the sense of 'completing' as well as 'making firm'. The word 'confirm' is a combination of the prefix 'con' (in archaic 'com') and the consonant 'firm'. The prefix 'con' means "completely; together". 'Firm' (as an adjective) means "fixed, settled, established, secure, sure" (*vide*, Shorter Oxford English Dictionary). According to Webster's International Dictionary, Second Edition, Vol. I, the transitive verb, 'to confirm', means "to *make firm;* to establish;..... to render valid by formal assent; to *complete* by a necesrary sanction;..... to ratify or validate the appointment, presentation or the like of a person to an office, power, etc". and 'confirmation means "an act of confirming or strengthening or establishing, ratifying or sanctioning, as the confirmation of an appointment, or election, or of a person in position".

(23) We are considering the meaning of 'confirmation', not in general, but in the context of confirming an appointment which was initially made on a trial basis. Thus considered, confirmation of a probationer in the Service means nothing different from appointing him on a substantive basis to the cadre of the Service, on satisfactory completion of his period of probation.

(24) The question arises: Is there anything in Articles 233 and 235 of the Constitution, which expressly or by necessary intendment, warrants an interpretation of the terms 'confirmation' and 'appointment' in a manner different from what is suggested by the ordinary grammatical meaning of the terms?

(25) Mr. Anand Swaroop Mittal-reinforcing the arguments of Mr. D. N. Awasthy—vehemently contends that the meaning of the

word 'appointment' in Article 233 must be restricted to the *initial* appointment. According to him, 'confirmation' is something which operates at a stage beyond such appointment, falling exclusively within the ambit of control of the High Court. The special provisions in Articles 233 to 237 of the Constitution, says Mr. Mittal, were incorporated in the Constitution, because the intention of the Constitution-makers was to ensure independence of the Judiciary from Executive control, and these provisions have to be interpreted in a manner, which is conducive to, and not destructive or restrictive of the object which the authors of the Constitution had in view. After the initial appointment of a District Judge, it is argued, the powers of the Governor are exhausted and the control of the High Court begins, and it extends to all matters (including conditions of service) governing the appointee. If the High Court thinks, proceeds the argument—that a District Judge on probation has satisfactorily completed his period of probation, it alone, in the exercise of its power of control, can confirm him. Learned counsel concedes that if in the opinion of the High Court, the work and conduct of such person has not been satisfactory, and he does not deserve to be confirmed, it shall have to move the Governor for passing a formal order terminating his service. The Control of the High Court, it is argued, is a complete control and it covers all matters, administrative, disciplinary and judicial, and the saving clause in Article 235, which speaks of "conditions of service", cannot be construed in a way which would drain out the content of control given to the High Court. Thus construed, says Mr. Mittal, 'confirmation', though a condition of service, cannot be taken out of the control jurisdiction of the High Court by the Governor, even by framing a rule under Article 309 of the Constitution.

(26) In support of his contention, Mr. Mittal has quoted some observations from *State of West Bengal* v. *Nripendra Nath Bagchi* (2) *State of Assam* v. *Ranga Mohammad* (3), *Mohammad Ghouse* v. *State of Andhra* (4), *and State of Assam* v. *Kuseswar* (1).

(27) In none of these cases cited by the learned counsel, the scope and meaning of the term 'confirmation', in the context of the powers of appointment and control of subordinate Judicial Officers, came up even for indirect consideration.

(2) A.I.R. 1966 S.C. 447.
(3) A.I.R. 1967 S.C. 903.
(4) A.I.R. 1955 A.P. 65.

(28) In *Nripendra Nath Bagchi's case* (2), *ibid*, the Government of West Bengal, without taking the High Court into confidence, held an enquiry through their own Agency and as a result thereof, dismissed a District and Sessions Judge. The question that came up for consideration before the Supreme Court was, whether such an enquiry ordered by the Government and conducted by an Executive Officer of the Government against the District Judge, contravened the provisions of Article 235, which vests in the High Court the control over the District Courts and Courts subordinate thereto. It was in that context that Hidayatullah, J., as he then was, said:

> "In our judgment, the control which is vested in the High Court is a complete control subject only to the power of the Governor in the matter of appointment (including dismissal and removal) and posting and promotion of District Judges. Within the exercise of the control vested in the High Court, the High Court can hold enquiries, impose punishments other than dismissal or removal, subject however to the conditions of service, and a right of appeal if granted by the conditions of service, and to the giving of an opportunity of showing cause as required by Clause (2) of Article 311, unless such opportunity is dispensed with by the Governor acting under the provisos (b) and (c) to that clause. The High Court alone could have held the enquiry in this case. To hold otherwise will be to reverse the policy which has moved determinedly in this direction."

(29) An analysis of the above observations would show that even on the authority of *Bagchi's case* (2), the control of the High Court is not untrammelled and unlimited, but subject to—

(a) the power of the Governor in the matter of appointment (including dismissal and removal) and posting and promotion of District Judges;

(b) the conditions of service (which the Governor may prescribe by rules under Article 309); and a right of appeal if granted by the conditions of service; and

(c) the giving of an opportunity of showing cause as required by Article 311(2), unless such an opportunity is dispensed with by the Governor acting under the provisos (b) and (c) to that Article.

(30) If 'confirmation' is a process of completing an appointment, originally made on trial basis, then it will clearly fall under the saving clause (a), and if it is also deemed a "condition of service", it will be further subject to the legislative power of the Governor under the proviso to Article 309 of the Constitution.

(31) The question with which we are faced, did not even remotely arise in that case. The decision in *Baghi's case* (2), therefore, is not of much assistance in resolving problem no. (i) before us.

(32) In *Ranga Mohammad's case* (3), *ibid*, the question for decision before the Supreme Court was, whether the transfer of a District Judge falls within the ambit of 'control' in Article 235, or is covered by the word 'posting' used in Article 233. It was observed:

> "This word (posting) occurs in association with the words 'appointment' and 'promotion' and takes its colour from them. These words indicate the stage when a person first gets a position or job, and 'posting' by association means the assignment of an appointee or promotee to a position in the cadre of District Judges ..... the word 'posting' canont be understood in the sense of 'transfer' when the idea of appointment and promotion is involved in the combination. In fact this meaning is quite out of place because *'transfer' operates at a stage beyond appointment and promotion.* If 'posting' was intended to mean 'transfer' the draftsman would have hardly chosen to place it between 'appointment' and 'promotion' and could have easily used the 'transfer' itself. It follows, therefore, that under Article 233, the Governor is only concerned with the appointment, promotion and posting to the cadre of District Judges, but not with the transfer of District Judges already appointed or promoted and posted to the cadre. The latter is obviously a matter of control of District Judges which is vested in the High Court."

(33) Towards the end of paragraph 10, at page 907 (3), it was further observed :

> "The High Court was thus right in its conclusion that the *powers of the Governor cease after he has appointed or promoted a person to be a District Judge and assigned him to a post of cadre.*"

(34) The learned counsel for the petitioner and Respondent 3 have picked out the underlined (*Italics in this report*) sentences from the above-quoted judgment and, on the analogy thereof, argue that an appointment or promotion of a person to be a District Judge, is complete as soon as he is first appointed or promoted to a post in the cadre of the Superior Judicial Service, and confirmation, just like transfer, is something which operates at a stage beyond such appointment and promotion.

(35) In the first place, there is a vast difference between the connotation of 'transfer' of an already appointed incumbent from one station to another, and 'confirmation' of a probationer on satisfactory completion of his period of probation against a substantive post in the cadre. Transfer, by itself, makes no change in the nature of the tenure or rank of the incumbent, while confirmation makes the appointment of the person confirmed, substantive and permanent in the cadre of the Service. Secondly, it is wrong to say that confirmation, like transfer, is a post-appointment matter. It will bear repetition that confirmation, in the context which we are considering, is the last step in completing and making firm the appointment of a person, initially appointed on probation. It is, therefore, not correct to say that confirmation operates at a post-appointment stage. It is not proper to read the underlined (*Italics in this report*) sentence in what has been quoted above, after isolating that from its context. The last sentence therein must be read together with the succeeding sentence, viz: "Thereafter, transfer of incumbents is a matter within the control of District Courts including the control of persons presiding there as explained in the cited case".

(36) Next case to be noticed is *Mohammad Ghouse's case* (4), *ibid.* Mohammad Ghouse, entered the Madras Judicial Service as a Munsif and was promoted to the office of the Subordinate Judge in September, 1949. On the formation of the Andhra State on October 1, 1953, he became a Member of the Andhra State Judicial Service. The High Court of Madras took disciplinary proceedings against him on a charge of bribery. A learned Judge of the High Court, specially appointed, enquired into the allegations. As a result of that enquiry, the High Court suspended Mohammad Ghouse, who challenged that order by a writ-petition. It was contended on behalf of Mohammad Ghouse that the High Court had no power to continue disciplinary proceedings against him after the Andhra Civil Service (Disciplinary Proceedings Tribunal) Rules came into force on October 1, 1953, and

that thereafter, the said power vested only in the Tribunal for disciplinary proceedings. On the other hand, the learned Advocate-General contended that these Rules were neither intended nor had the effect of removing the pre-existing jurisdiction from the High Court and transferring it to the Tribunal, and that even if that was the effect, it would be *ultra vires* of the rule-making power of the Government. The High Court examined both sets of Rules of the Disciplinary Proceedings Tribunals existing in Madras as well as in the Andhra Pradesh, and observed:

> After carefully going through the two sets of rules, we should think that, in attempting to draft the rules artistically, some unintended and unexpected confusion was introduced. But we are satisfied that no conscious departure from the Madras Rules was intended."

(37) After giving this finding, the Bench held that if this conclusion was reached that the Andhra Rules took away the power of the High Court to hold an enquiry against a Judicial Officer, such a construction would come into conflict with the provisions of Articles 227 and 235 of the Constitution, whereunder the control and superintendence of all subordinate Courts is vested in the High Court. After an examination of all the relevant provisions of the Constitution, the Court concluded :

> "We would, therefore, hold that 'conditions of service' in Article 235 can only mean the conditions regulating the exercise of the power of control. A condition of service, therefore, providing in effect and substance that the High Court shall not have power to take disciplinary action either in exercise of its power of superintendence under Article 227 or under the power of control under Article 235, is constitutionally invalid."

(38) It will be seen that *Mohammad Ghouse's case* (4) does not go beyond what has been laid down by the Supreme Court in *Bagchi's case* (2), namely, that the 'control' in Article 235 includes disciplinary jurisdiction as well. Thus, *Mohammad Ghouse's case* (4) also, does not advance the case of the petitioner so far as the first question under consideration is concerned.

(39) In *Kuseswar's case* (1) *ibid*, which is the sheet-anchor of the arguments advanced by M/s. D. N. Awasthy and Mittal, one

Upendra Nath Rajkhowa, who was a member of the Assam State Judicial Service (Junior), was first appointed as an Additional District Judge and later on as District Judge by the Governor of Assam. The High Court of Assam struck down his promotion and appointment, holding that (i) appointment to be a District Judge is to be made by the Governor in consultation with the High Court under Article 233(i), and (ii) that promotion to be a District Judge (as distinguished from promotion of District Judge spoken of in Article 233) was to be made by the High Court in exercise of its powers under Article 235 of the Constitution. The High Court gave an example of a Selection Grade post of the cadre of District Judges, which, according to it, is a case of promotion of a District Judge. On appeal, the Supreme Court reversed the decision of the High Court, and pointed out that this erroneous view of the High Court was the result of a reading of Article 233 in a manner contrary to its grammer and punctuation. In that context, Hidayatullah, C.J., said:

> The article, if suitably expanded, reads as under:
>
> 'Appointments of persons to be, and the posting and promotion of (persons to be), District Judges etc."
>
> "It means that appointments as well as promotion of persons to be District Judges is a matter for the Governor in consultation with the High Court and the expression 'District Judge' includes an Additional District Judge and an Additional Sessions Judge. It must be remembered that District Judges may be directly appointed or may be promoted from the subordinate ranks of the judiciary. The article is intended to take care of both. *It concerns initial appointment and initial promotion of persons to be either District Judges*..... Further promotion of District Judges is a matter of control of the High Court."

(40) The entire burden of the argument of the learned counsel falls on the word 'initial' used twice by the Supreme Court with the words 'appointment' and 'promotion' in the sentence that has been underlined (Italics in this report). According to the counsel, the word 'initial' was used by their Lordships to convey that once a person is initially appointed on probation to the cadre of District Judges, the power of the Governor under Article 233 is exhausted, and his confirmation as District Judge would be a matter of 'further pro-

motion' falling within the ambit of 'control' of the High Court under Article 235.

(41) Again, I would say that it is not permissible to cull out the aforesaid sentence, in which the word 'initial' occurs twice, and then to spell out of it, a proposition, which never came up for determination in the said case. The question, in the context which these observations were made by the Supreme Court, was, whether the High Court is competent to promote a member of the Junior Judicial Service to a post in the Superior Judicial Service in exercise of its power under Article 235. This question was answered in the negative. As I understand those observations, the words 'initial appointment' and 'initial promotion' were used by their Lordships to emphasise and bring out clearly the distinction between the power of appointment of persons to be District Judges, that vests in the Governor under Article 233, and the further promotion of District Judges in the superior cadre itself, that would fall within the control of the High Court under Article 235. In the context, 'further promotion' of District Judges meant further promotion to the selection grade posts in the cadre of District Judges as pointed out by the High Court. In my opinion, the judgment in *kuseswar's case* (1) is not susceptible of any other reasonable interpretation. If the sentence containing the words 'initial appointment' and 'initial promotion' is read out of context, it will do violence to the judgment read as a whole. The sentence that speaks of initial appointment and initial promotion has to be read together with the words 'further promotion'.

(42) It is well settled that a decision is a precedent on its own facts and every observation in a judgment is not its *ratio*. No less an authority than the Supreme Court, itself, in *State of Orissa* v. *Sudhansu Sekhar* (5) with particular reference to *Bagchi's case* (2) and *Ranga Mohammad's case* (3) *ibid*, warned against the improper practice of extracting a sentence or a word from a judgment and to spell out of it, by some process of ratiocination, a whole theory. In that case, the Supreme Court was considering the question, as to whether the High Court was competent to fill some of the posts in the Secretariat by transfer of a Judicial Officer under its control. Hegde J. speaking for the Court observed :

> ".....The reference to the cadre (in *Ranga Mohammad's case*, (3) was merely incidental. A decision is only an

(5) A.I.R. 1968 S.C. 647.

authority for what it actually decides. What is of the essence in a decision is its *ratio* and not every observation found therein, nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury LC said in *Quinn* v. *Leathem* (6):

"Now before discussing the case of *Allen* v. *Flood* (7) and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must acknowledge that the 'law is not always logical at all.'

It is not a profitable task to extract a sentence here and there from a judgment and to build upon it."

(43) To understand the connotation of 'confirmation', we may further examine the meaning of 'appointment' in the context of Article 233 and the 1963 Rules. Rule 2(1) of the 1963 Rules says :

" 'Appointment to the Service' means an appointment to a cadre post, whether on permanent, temporary or officiating basis or on probation."

(44) A direct recruit under these Rules is appointed on probation for a period of two years, which may be so extended as not to exceed a total period of three years. The tenure of such a direct recruit, appointed on probationary basis, is of an infirm and precarious character. His appointment from its very nature is conditional on satisfactory completion of his period of probation, and his appointment does not become complete so long as he does not comply with this condition to the satisfaction of the appointing authority. The

(6) (1901) A.C. 495.
(7) (1898) A.C. 1.

view that 'confirmation' means a permanent appointment to the cadre, is borne out by the above-quoted definition of 'appointment' given in rule 2(1) of the 1963 Rules. It may not be the initial appointment on probationary basis. It is certainly the ultimate appointment on a substantive basis. It may be noted that the validity of Rule 2(1) has not been specifically challenged.

(45) The question can be considered from another angle. Section 16 of the General Clauses Act, 1897, which applies to the interpretation of the Constitution (by force of Article 367 thereof), runs thus:

> "16. *Power to appoint to include power to suspend or dismiss.*— Where, by any Central Act or Regulation, a power to make any appointment is conferred, then, unless a different intention appears, the authority having for the time being power to make the appointment shall also have power to suspend or dismiss any person appointed whether by itself or any other authority in exercise of that power."

(46) Applying the principle of section 16 (*ibid*) it is clear that the power of appointment vesting in the Governor under Article 233 will also embrace within its scope the power of dismissal and removal from service, including termination of or dispensing with the services of a probationer. Now, let us turn to Rule 10 of the 1963 Rules. The vires of its sub-rules (1) and (3) has not been specifically attacked. Sub-rule (1) gives power to the Governor to extend, in consultation with the High Court, the two years' period of probation of a direct recruit in a manner that it does not exceed a total of 3 years. Proviso to this sub-rule gives the Governor power to reduce the period of probation after consulting the High Court. Sub-rule (3) empowers the Governor, acting in consultation with the High Court, to dispense with the services of a direct recruit, if his work or conduct has, in the opinion of the Governor, not been satisfactory. As soon as the period of probation of a direct recruit is completed, or is about to be completed, the question of confirming or not confirming him (which is the same thing as removing or discharging him from service) immediately arises. Thus, the question of confirmation is inextricably bound up with that of non-confirmation or termination of the service of a probationer. Confirmation and non-confirmation/termination of service are positive and negative aspects of the same power. If the negative aspect of the power, viz., the removal or discharge from service, vests in the Governor, it will be anomalous to

hold that the positive aspect of the same power should be with some other authority. In the absence of anything in the language of Articles 233 and 235 warranting, expressly or by necessary implication, a contrary interpretation, it must be held that the authority to appoint a District Judge, on probation, and to confirm that appointment on satisfactory completion of his probation, or to terminate his services in case of unsatisfactory performance, must necessarily be the Governor.

(47) In the view I take, I am fortified by the *ratio* of *State of Assam* v. *S. N. Sen* (8). Since both the sides claim that this case helps their respective contentions, it is proposed to notice it in some detail. The decision of the High Court of Assam and Nagaland, which was upheld by the Supreme Court in this case, is reported as *S. N. Sen* v. *State of Assam* (9). The facts of that case were that S. N. Sen was initially appointed as an Extra Assistant Commissioner by the Governor of Assam on December 21, 1950. Thereafter, he opted for Judicial Service and was appointed as Munsif by the Governor of Assam with effect from January 1, 1955. He was confirmed in the post of Munsif in Assam Judicial Service (Junior) Grade II with effect from December 8, 1956. On December 15, 1961, he was promoted to act as Additional Sub-Judge, Cachar, and he took over as such on the 22nd December, 1961. The High Court of Assam and Nagaland, in exercise of its powers under Article 235 of the Constitution, by a Notification, published in the Gazette on May 1, 1964, confirmed S. N. Sen in his post in the Assam Judicial Service (Junior) Grade I. The Accountant-General raised objection that such confirmation was in violation of Rule 5(iv) of the Assam Judicial Service (Junior) Rules, 1954, which read as under :

> "When a person is appointed to a permanent post, he will be confirmed in his appointment at the end of the period of probation or extended period of probation. In case of the Deputy Registrar and Assistant Registrar of the High Court confirmation shall be made by the High Court. *In other cases* it will be made by the Governor in consultation with the High Court."

(48) S. N. Sen filed a writ petition in the High Court. The two learned Judges, who dealt with the case in the High Court, wrote

(8) A.I.R. 1972 S.C. 1028.
(9) I.L.R. (1966) 18 Assam 417.

separate judgments. Mehrotra, C. J., dealing with the question as to who was competent to confirm the promotion, observed :

A B A-1 "It will be anomalous to hold that the power of promotion and posting vests in the High Court while the power of confirming an officer in the post vests in the Government. With regard to the scheme of the Constitution and the Rules, it is clear that rule 5(iv) applies to the persons who are appointed by direct recruitment to the post of a Sub-Judge and not to the persons who have been promoted. In my opinion, therefore, the power to confirm the Judicial Officers who have been promoted vests in the High Court.

B-1 C A-2 "Rule 5(iv) says that when a person is appointed to a permanent post he will be confirmed in his appointment. Thus rule 5(iv) will only be attracted to the cases where the power of appointment vests in the Governor. The rule will not apply to the cases where the promotion vests in the High Court.....The word 'confirmation' is not used in any of these articles and thus confirmation is either in the appointment or in the promotion.

The right to confirm necessarily vests in an authority which has got power to promote."

(49) After expressing that Rule 5(iv) was not applicable to the persons directly appointed by the Governor to the Service, the learned Chief Justice considered the alternative aspect of the matter and observed:

"In rule 5(iv) if the words:

"In case of the Deputy Registrar and Assistant Registrar of the High Court confirmation shall be made by the High Court. In other cases it will be made by the Governor in consultation with the High Court."

D are interpreted to include confirmation and promotion, then the rule will be contrary to the constitutional mandate in Article 235 of the Constitution and will be *ultra vires*. Regarding the Deputy Registrar and Assistant Registrar the rule says that it will be confirmed by the High Court. This part of the rule is *ultra vires* of Article 229 of the Constitution."

(50) On the other hand, S. K. Dutta, J., adopted a different course in coming to the same conclusion. He said:

> "Next, I come to the question of confirmation. In this connection it is not necessary to examine Rule 5(iv) of the Assam Judicial Service (Junior) Rules, 1954, on which the State of Assam and the Accountant-General, Assam, rely in their contention that a Subordinate Judge can be confirmed in his post only by the Government. If the rule is in conflict with any Constitutional provision, it will be void and must be struck down."

After referring to *Bagchi's case* (2), the learned Judge proceeded:

> "In my view the 'withholding of confirmation' is a punishment. It has penal consequences as it affects pension, increments in salary, promotion, etc. Confirmation can be withheld only for some specific fault on the part of an officer. Otherwise, it is automatic. The High Court being alone competent to impose the above punishment of 'withholding confirmation', it alone can confirm a member of the Judicial Service, be he a District Judge, Subordinate Judge or a Munsiff."

(51) On the question as to whether confirmation is a part of appointment, the learned Judge further said:

> "But I do not think that there is any justification to hold confirmation as part of an appointment or promotion. As pointed out by the Supreme Court in *P. C. Wadhwa* v. *The Union of India* (10), the term 'appointment' always connotes initial appointment. In *Tribhuwannath Pandey* v. *Government of Union of India* (11), the High Court of Nagpur held that the discharge of a probationer for unsuitability amounted to removal within the meaning of Article 311 of the Constitution. In *Gopi Kishore Prasad* v. *State of Bihar* (12), the Patna High Court held that when proceedings were drawn up against a probationer for his removal, he was entitled to a second notice under Article

(10) A.I.R. 1964 S.C. 423.
(11) A.I.R. 1953 Nagpur 138.
(12) A.I.R. 1955 Patna 372.

> 311(2). I respectfully agree with these views ..... An appointment is complete as soon as it is made and the subsequent confirmation depends on satisfactory work of the probationer. For some specific fault of the petitioner, the High Court may withhold confirmation for a particular period. It may go on extending the period if the work of the officer is not satisfactory. Ultimately if it decides that he should be removed from service for unsatisfactory work or negligence or some other fault the High Court may draw up proceedings and then move the Government for his removal if it is not satisfied with the explanation of the officer."

(52) With great respect, it is submitted that the line of reasoning adopted by Dutta, J., was erroneous. Withholding of confirmation ordinarily is not a punishment. The view taken by the learned Judge that the discharge of a probationer for unsuitability amounts to removal within the meaning of Article 311 is against the weight of Supreme Court authorities, which will be noticed elsewhere in this judgment. This reasoning has not been adopted whole-hog even by the learned counsel for the Respondent 3, though support is sought from the rather sweeping observation in Mr. Justice Dutta's judgment, that "appointment' always connotes 'initial appointment'."

(53) It is to be noted that in *P. C. Wadhwa* v. *Union of India* (10), *ibid,* on which Dutta, J., relied for this observation, no such general rule was laid down. In that case, the Supreme Court was examining the scheme and meaning of the Rules framed by the Central Government, governing the rights, pay, privileges, discipline, etc., of the members of the Indian Police Service. It was in that context that the Supreme Court observed :

> "..... there is no specific rule which prescribes the conditions for transfers or 'promotion' of a person holding a post carrying a pay in the junior scale to a post carrying salary in the senior scale. Nor again, is there any such rule which specially provides that in so far as a member of the Indian Police Service is concerned, he has to be freshly appointed to a post carrying a salary in the senior scale of pay. *This may be apparently because appointment connotes only initial appointment to the Service*" (there being only one cadre of Service) (within brackets mine).

(54) It is manifest that in *P. C. Wadhwa's case* (10), their Lordships did not lay down any general rule of universal application. To justify his own hypothesis, the learned Judge (Dutta, J.)—it is submitted with due deference—tore out a sentence from the context of the Supreme Court judgment and read into it the word 'always'—which was not there—and omitted the words "to the service", which were very much there.

(55) When *S. N. Sen's case* went up in appeal before the Supreme Court, their Lordships did not take notice of the observations of Dutta, J., regarding non-confirmation being a punishment, and 'appointment' being always an 'initial appointment'. They took notice of only so much of his judgment, wherein it was said that if the rule was in conflict with the Constitutional provisions, it would be void. But their Lordships reproduced the portions marked A, B and A.1 (in the quotes above) from the judgment of Mehrotra, C.J., in paragraph 13 of their judgment and further expressly approved the reasoning of the learned Chief Justice (in the portions marked A and A.1 in the quotes above), when they observed :

> "Under the provisions of the Constitution itself.....the power of promotion of persons holding posts inferior to that of the District Judge is in the High Court. It stands to reason that power to confirm such promotion should also be in the High Court."

(56) Further, while their Lordships impliedly disagreed with the view of the learned Chief Justice (*vide* B and B.1 in the quotes above) regarding Rule 5(iv) being inapplicable to the case of promotees, they seem to have accepted substantially the principle enunciated by the learned Chief Justice (in his above-quoted observations marked C and A.2); viz., that "the right to confirm necessarily vests in the authority which has got power to promote". The alternative reasoning of Mehrotra, C.J. (*vide* D in the quotes above) was also, to a large extent, accepted.

(57) After quoting a passage from *Ranga Mohammad's case, ibid,* that the High Court is in the day to day control of Courts and knows the capacity for work of individuals and the requirements of a particular station or Court, their Lordships (in *S. N. Sen's case*) proceeded:

> "This observation was made in relation to a case of transfer, but it applies with greater force to the case of promotion.

> The result is that we hold that *the power of promotion* of persons holding posts inferior to that of the District Judge *being in the High Court, the power to confirm such promotion is also in the* High Court. We also hold that *in so far as* Rule 5(iv) is in conflict with Article 235 of the Constitution, it must be held to be invalid."

(58) It will be clear from the foregoing discussion and the observations, quoted above, that their Lordships, on the whole, approved, either expressly or by implication, the line of reasoning adopted by the learned Chief Justice of Assam High Court. I respectfully agree with the learned Chief Justice that the confirmation is either in appointment or in promotion. And, in the context of Articles 233 and 235 of the Constitution, the confirming authority would be the same who was competent to make the appointment or promotion, as the case may be.

(59) M/s. D. N. Awasthy and Mittal contend that *S. N. Sen's case* helps their contention, inasmuch as it *also* proceeds on the basis that confirmation or promotion is a part of the control of the High Court. In that view of the matter, it is urged that *S. N. Sen's case* furnishes an illustration of the proposition that the appointing power and the confirming power may not vest in the same authority. It is maintained that Rule 5(iv) was struck down by the Supreme Court, not only *qua* the confirmation of the promoted officers, but also, in regard to those directly appointed by the Government.

(60) The contention is attractive, but fallacious. The clause of Rule 5(iv) relating to confirmation could be divided into two portions. The *first* portion, which related to the confirmation of the Deputy Registrar and the Assistant Registrar of the High Court, was violative of Article 229 of the Constitution, and, as such, it was struck down by Mehrotra, C.J., and the correctness of that finding was not questioned before the Supreme Court. The *second* portion of this rule was the one which purported to govern confirmation "in other cases". It was the vires of this portion that was under consideration by the Supreme Court. In this portion, the expression "other cases" covered two classes of appointees: The one was of those directly appointed by the Governor, in accordance with the Rules framed under Articles 234 and 309 of the Constitution, and the second was of officers promoted by the High Court from Grade II of the Junior

Service to Grade I of the same Service in exercise of its powers expressly derived from Article 235. It is with reference to this second portion of Rule 5(iv) that their Lordships said that in so far as it was in conflict with Article 235 of the Constitution, it was invalid. Mr. J. N. Kaushal has, therefore, very rightly pointed out that the words 'in so far as' used by their Lordships, unmistakably indicate that only that portion of the rule, which appeared to cover the cases of officers promoted by the High Court, was struck down on the ground that it was in conflict with Article 235 of the Constitution. The rest of this portion, governing the confirmation of persons directly appointed by the Governor, was left intact. Their Lordships did not say anything in their judgment as to who would be the confirming authority in the case of persons directly appointed by the Governor to the Assam Judicial Service, Grade I. It is true that their Lordships were interpreting the word 'promotion' in Article 235, but, as explained in *Ranga Mohammad's Case*, the terms 'appointment', 'promotion' and 'posting' in Articles 233, 234 and 235 are cognate expressions, taking their colour from each other. There is an element of appointment in each of these terms. Their Lordships could, therefore, in the context, strike down the remaining part of Rule 5(iv) relating to the direct appointees, also, but they advisedly did not do so. In the circumstances, would it be too much to infer that this part of the rule was left intact, because it was not in conflict with Article 235 of the Constitution?

(61) Be that as it may, the judgment of the Supreme Court in *S. N. Sen's case* is not based on the ground that the power of confirmation of Judicial Officers is a matter of control of the High Court. The observations in *Bagchi's case* were quoted only to show that the power of such promotion was expressly given to the High Court. The only ground on which the judgment proceeds is, that Article 235 of the Constitution *expressly* gives the power of promotion of persons holding posts inferior to that of a District Judge to the High Court, and that it stands to reason that the power to confirm such promotions also vests in the High Court. On parity of reasoning, there is no escape from the conclusion that since Article 233 *expressly* gives the power of appointment and promotion of persons to be District Judges to the Governor, the power to confirm such appointments and promotions also vests in the Governor. The first question posed is answered accordingly.

(62) The second question to be considered is: "If the power of confirming a District Judge vests with the Governor, who is the

authority competent to certify/recommend/advise, that such person has or has not satisfactorily completed the period of probation?"

(63) Since the pronouncement of their Lordships of the Supreme Court in *Bagchi's case,* it is settled law, that the 'control', under Article 235 of the Constitution, vesting in the High Court, includes disciplinary jurisdiction, in the exercise of which the High Court alone, is competent to initiate and hold enquiries, and award punishments (other than dismissal and removal) to the District Judges and other members of the subordinate Judiciary. In the current popular sense, 'to discipline' means to "chastise", "thrash", "punish", but in its wider dictionary sense (in earlier use), it means to "educate, train in a certain mode of life or conduct." (See Shorter Oxford English Dictionary). The High Court being in the day-to-day control of the subordinate Courts, is best suited to form a correct estimate of the work, capacity and conduct of a Judicial Officer on probation, working under its control. The High Court being the sole custodian of such control, all enquiries against an officer of the subordinate judiciary, whether for the purpose of punishing him, if found guilty, or for ascertaining his suitability, or otherwise for confirmation, can be initiated and conducted by the High Court and the High Court alone, and the Government or any other authority, without the concurrence of the High Court, is not competent to initiate or hold any enquiry against a District Judge or a member of the Judicial Service of the State. In this view of the matter, the Government was not competent to get the enquiry made against the petitioner through the Director, Special Enquiry Agency, even though its object was to ascertain the suitability or otherwise of the petitioner for confirmation.

(64) Since confirmation or removal from service are matters falling within the realm of the Governor's power of appointment, consultation with the High Court under Article 233 of the Constitution read with Rule 10(2) of the 1963 Rules, was mandatory before the exercise of such power by the Governor. The control vested in the High Court under Article 235 of the Constitution, read together with the mandate of Article 233 of the Constitution, makes it abundantly clear that the High Court alone was competent to certify/recommend/advise, as to whether or not the petitioner had satisfactorily completed the period of probation.

(65) This takes me to the 3rd question: "Whether in the present case, the impugned orders were passed by the Governor after such

consultation with the High Court as is envisaged by Article 233 of the Constitution and Rule 10(2) of the 1963 Rules?"

(66) In *Chandra Mohan* v. *State of Uttar Pradesh* (13), it was held by the Supreme Court that the mandate of Article 233 can be disobeyed by the Governor in two ways, i.e., (1) by not consulting the High Court, and (2) by consulting the High Court and other persons, because his mind may be influenced by those other persons who are not entitled to advise him. In the instant case, unfortunately, there has been both direct and indirect non-compliance with the Constitutional mandate.

(67) It is, no doubt, true that in the present case, the Governor (which, as I shall presently discuss, means the Governor acting on the advice of the Council of Ministers) made persistent and prolonged efforts to solicit the views of the High Court with regard to the suitability or otherwise of the petitioner for confirmation. The Government also made repeated efforts to procure the service record and the report of the enquiry conducted by Mr. Justice Gurnam Singh into the complaint against Shri N. S. Rao, in order to enable them to take a decision in the matter. The High Court failed to accede to these requests, because in its opinion (formed on the administrative side), the power of confirming a District Judge vested in the High Court under Article 235 of the Constitution, and the Government had no jurisdiction in the matter.

(68) It was contended by Mr. Mittal that the Government acted with undue haste, because the High Court had not finally closed the chapter or refused to supply the necessary information. We are adverted to the reply sent by the Registrar, High Court, to the Government's letter of June 12, 1973, wherein it is said that the matter was under consideration and a final reply would be sent on the reopening of the High Court, that is, 15th July, 1973. The Governor, it is urged, should have waited for the reopening of the High Court, which had been closed for vacation.

(69) The learned Advocate-General, appearing for Respondents 1 and 2, points out, in reply, that the Government were labouring under a misapprehension about the true scope and effect of the rule enunciated by the Supreme Court in *The State of Punjab* v. *Dharam Singh* (14) and were genuinely of the view that if a decision

(13) A.I.R. 1966 S.C. 1187=(1967) 1 S.C.R. 77.

(14) A.I.R. 1968 S.C. 1210.

was not taken either way, before the 7th July, 1973, the date on which the three years' maximum period of the petitioner's probation expired, the petitioner would earn automatic confirmation by operation of law. There is force in what the learned Advocate-General has said. That the Government were labouring under such a misapprehension about the law laid down by the Supreme Court in *Dharam Singh's case* (supra), repeatedly finds expression in the correspondence which has been copiously referred to in the opening part of this judgment. Mr. Mittal also contended that in its letter dated April 10, 1973, the High Court had informed the Government that the work and conduct of the petitioner during his period of probation had been satisfactory, and that this was sufficient certification or recommendation to enable the Governor to pass, if necessary, a formal order in consonance with that information.

(70) The argument is devoid of force. In the aforesaid letter, the High Court also informed the Government that since the confirmation was within the exclusive power of High Court, they had confirmed the petitioner in the service. The High Court further refused to send the service record and information about the petitioner to the Government. The Government were, thus, confronted with a *fait accompli.*

(71) It is no use apportioning blame for the unfortunate situation that had arisen. The fact remains that the impugned orders were passed without any proper and effective consultation with the High Court, and are, therefore, invalid.

(72) The three allied questions: what is consultation, whether the Constitutional requirement as to consultation is mandatory, and whether the Governor is bound to accept whatever advice is given by the High Court, recently came up for consideration before the Supreme Court in *Chandramouleshwar Prasad* v. *The Patna High Court and others* (15). The answers given by their Lordships to these questions have been summed up in Head-note (B) of the Report, thus:

> "The appointment of a person to be a District Judge rests with the Governor but he cannot make the appointment on his own initiative and must do so in consultation with the High Court. The underlying idea of the Article is that the Governor should make up his mind after there

(15) A.I.R. 1970 S.C. 370.

has been a deliberation with the High Court. The High Court is the body which is intimately familiar with the efficiency and quality of officers who are fit to be promoted as District Judges. The High Court alone knows their merits as also demerits. This does not mean that the Governor must accept whatever advice is given by the High Court but the Article does require that the Governor should obtain from the High Court its views on the merits or demerits of persons among whom the choice of promotion is to be limited. If the High Court recommends A while the Governor is of the opinion that B's claim is superior to A's it is incumbent on the Governor to consult the High Court with regard to its proposal to appoint B and not A. If the Governor is to appoint B without getting the views of the High Court about B's claims vis-a-vis A's to promotion, B's appointment cannot be said to be in compliance with Article 233 of the Constitution. Consultation with the High Court under Article 233 is not an empty formality. Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views. If one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the proposer the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation. In the absence of consultation the validity of the notification by the Governor appointing a person as a District Judge cannot be sustained."

(73) The advice given by the High Court is entitled to the highest regard and is not to be received with ill-grace or rejected out of hand, because the High Court alone, as already discussed, in exercise of its power of control, is in the most suitable position to gauge the work and worth of a Judicial Officer. Though the role of the High Court is advisory and consultative, yet, as a matter of healthy practice, sound convention and good administration, the Governor is expected to accept it and make it effective, as the learned Advocate-General put it: in 99.9 per cent cases.

(74) It was contended by M/s Awasthy and Mittal, that if the power of confirming an appointment is conceded to the Governor, it

will be open to gross abuse, seriously impinging on the independence of the judiciary. That a power is susceptible to abuse is no ground to deny its existence. That even in matters of appointment, confirming an appointment, dismissal and removal, concerning members of the Judicial Services of the State, the Judiciary should be completely independent and free from executive interference, is a consummation devoutly to be wished. But we have to interpret the Constitution *as it is* and not as it *ought to be*. We must grasp the nettle of truth that the Constitution-makers have not gone, in ensuring the independence of the judiciary, that far. We have to accept the stark reality that our Constitution gives the power of making an appointment of a District Judge—whether on probationary, officiating or substantive basis—to the Governor. The Constitution-makers were not oblivious of the possibility of such abuse when they gave this power to the Governor. Apart from the dictates of prudence and tradition, the only sanction against such abuse in our parliamentary system of Government, is that the latter is answerable for all its actions to the Legislature, and through it, to the people.

(75) The next point to be considered is: "Whether in acting on the advice of the Council of Ministers the Governor had indirectly disobeyed the mandate of Article 233 of the Constitution".

M/s Awasthi and Mittal contended that while dealing with the High Court in such matters, the Governor has to act solely on the advice of the High Court. He has to act merely as a Constitutional Head to pass, in his own discretion, a formal order, in accordance with the recommendation of the High Court, without allowing him to be influenced by the advice tendered by the Council of Ministers. Developing this argument, it is said that there are three wings of the State, that is, (i) the Legislature, (ii) the Executive and (iii) the Judiciary, and according to the scheme of the Constitution, the Governor, while dealing with the Judiciary, has to act on the advice of the High Court. Support for this ingenious argument is sought from certain observations, made in *Ishwar Chander Aggarwal* v. *The State of Punjab* (16) by our learned brother Tuli J., and from certain obiter observations made in *Inder Parkash Anand* v. *The State of Haryana and others* (17).

(16) C.W. No. 86 of 1970 decided on 17th September, 1970.

(17) I.L.R. 1972 (1) Pb. & Hr. 698.

(76) This contention is devoid of force. It has been laid down by a Full Bench of this Court in *The State of Punjab.* v. *Om Parkash Dharwal and another,* (18) that while performing his executive functions under Articles 233 and 234 of the Constitution, the Governor does not act in his discretion, but on the advice of the Council of Ministers. The rule laid down in *Om Parkash Dharwali's case,* (18) (*supra*), is impeccable. The Constitutional position, as clarified in that decision is clear even from a bare reading of clause (1) of Article 163 of the Constitution, which says:

> "There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, *except in so far as he is by or under his Constitution required to exercise his functions or any of them in his discretion.*"

The exercise of his functions by the Governor under Article 233 of the Constitution, relating to the appointment of District Judges, does not fall within this exception. I, therefore, over-rule this contention.

(77) It was further contended on behalf of the petitioner that in consulting or allowing itself to be influenced by the report of the Director, Special Enquiry Agency, the Governor had contravened not only the mandate of Article 233 of the Constitution regarding consultation with the High Court, but had also encroached upon the 'control' vesting in the High Court under Article 235 of the Constitution. The learned Advocate-General says, that the Government were placed in a peculiar situation because the High Court had refused to play a consultative role and to tender necessary advice to the Government in the matter. In the circumstances, when the date of the expiry of the maximum period of probation was drawing ever nearer and nearer, the Government thought that in order to enable the Governor to discharge the duty enjoined by the Constitution and the Rules, in time, they had no option but to ascertain by making enquiry through their own source regarding the fitness or otherwise of the petitioner to be confirmed.

(78) It appears to me that the contention of the learned counsel for the petitioner must prevail on this point.

(79) In the first place, the apprehension of the Government that the petitioner would earn 'automatic confirmation', immediately on

(18) I.L.R. 1972 (2) Pb. & Hr. 289=1973 (1) S.L.R. 135.

the expiry of the 7th July, 1973, was not founded on a correct interpretation of the rule in *Dharam Singh's case* (supra). It is true that in some rulings of this Court, also, *Dharam Singh's case* (supra) was erroneously interpreted, but several subsequent rulings have clarified the position. In *Dharam Singh's case* (supra), the maximum period of probation had expired. No action whatever was initiated against him. He continued to draw grade increments for a sufficiently long time after the expiry of his probationary period. It was, in view of these circumstances, that it was held that the incumbent should be deemed to have been confirmed, by *implication.*

(80) *Secondly,* a plea of necessity, urgency or compulsion is no justification for not complying with the Constitutional mandate of Article 233. If a provision is mandatory, it is so in all circumstances. It cannot be treated to be mandatory in one situation and directory in another. In making these impugned orders, the Governor was influenced by an extraneous consideration, viz. the report of the Director, Special Enquiry Agency and thereby contravened the provisions of Articles 233 and 235 of the Constitution.

(81) The fourth question is: "Whether the impugned order is void, as no notice in compliance with the mandate of Rule 9 of the Appeal Rules, was issued to the petitioner?" It is common ground that no such notice was issued.

(82) Mr. Kaushal contends that no such notice under Rule 9 of the Appeal Rules was required to be given to the petitioner because:

(a) Rule 17 of the Superior Judicial Service Rules has not made the Appeal Rules applicable to probationer District Judges in matters other than *matters of discipline, penalty or appeal,* and the language of rule 10(2) of the 1963 Rules, read with Rule 1(2) of the Appeals Rules excludes the application of the aforesaid Rule 9;

(b) The petitioner was not a 'probationer', but only 'on probation', according to the definition of 'probationer' given in Rule 2.49 (chapter II) of the Punjab Civil Service Rules, Volume I, Part I (Main Rules);

(c) Rule 9 of the Appeal Rules is applicable only in the case of termination of an *employment* and not where a person

is reverted to his substantive rank and continues to be in the employment of the Government. By the impugned rules, the petitioner was only reverted to his substantive rank as a District Attorney.

None of the contentions (a), (b) and (c) is tenable.

(83) In support of his contention (a), Mr. Kaushal has placed reliance on a Division Bench decision of this Court in *Hari Singh Mann* vs. *The State of Punjab and others* (19). Our learned brother Mahajan, J., was a party to that judgment. An examination of that judgment shows that Rule 3 of the Appeal Rules had escaped the notice of the learned Judges in that case. In my view, this case was not correctly decided.

(84) The relevant provisions of the Appeal Rules are:

"1(2) *Except as expressly provided* by or under any law for the time being in force as respects disciplinary matters or rights similar thereto applicable to the case of any person holding a Civil post under the State, these rules shall apply to all persons belonging to the Services and posts in connection with the affairs of the State of Punjab whether in Service before or after the commencement of the Constitution, but they shall not apply to:

(a) persons appointed to All India Services ;

(b) Persons having been appointed by the Secretary of State or the Secretary of State in Council to a Civil Service of the Crown in India who continue to serve under the Government of India or of a State on or after the commencement of the Constitution,

(c) persons in respect of whom conditions of service and disciplinary matters and the conduct thereof special provision has been made by agreement entered into before or after these rules come into force.

3. All powers, *rights* and remedies provided by these rules shall be *in addition to and not in derogation of* the provisions of such rules as may be made by the Governor of Punjab, in exercise of the powers conferred by proviso

(19) 1970 S.L.R. 915.

to Article 309 of the Constitution of India, to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State of Punjab."

The material part of sub-rule (I) of Rule 17 of the 1963 Rules reads:

"*In matters relating* to discipline, *penalties and appeals,* members of the Service shall, without prejudice to the provisions of the Public Servants (Inquiries) Act, 1850, be governed by the Punjab Civil Services (Punishment and Appeal) Rules, 1952, as amended from time to time..... ....."

(85) It may be remembered that Rule 9 of the Appeal Rules is a beneficient provision, which affords protection to a probationer against termination of his services in an arbitrary manner. It contains substantive, mandatory provisions. The exclusion of its application to the case of a probationer, serving in connection with the affairs of the State, cannot be readily inferred unless its application is expressly excluded by the special Rules of Service pertaining to his cadre.

(86) The relevant rules have to be interpreted in accordance with this principle, and, for the purpose of the point under consideration, the word 'discipline' in Rule 17 of the 1963 Rules, has to be interpreted in the widest sense as including the function of imparting instruction and training to probationers and disciplining them to a mode of work and conduct in the service. Thus construed the word discipline' will cover the matter of probation, also. Even if the narrower meaning of the term is accepted, then also, there is nothing in the language of Rule 17 of the 1963 Rules, which *expressly* excluded the application of Rule 9 of the Appeal Rules to the case of a probationer District Judge. Rule 17 of the 1963 Rules has to be read together with Rule 3 of the Appeal Rules. From such combined reading, it will be clear that even if the word 'discipline' does not, under its cover, bring in Rule 9 of the Appeal Rules, the protection of the same (Rule 9) has been expressly extended by Rule 3 of the Appeal Rules inasmuch as it says that the rights and remedies provided by the Appeal Rules shall be "in addition and not in derogation of the provisions of" other service rules.

(87) Regarding Mr. Kaushal's contention (b) it may be noted in the first place, that in his written statement [para 22 (f)], Respondent No. 1 clearly admitted that the petitioner was a probationer. Secondly, his case is covered by the definition of 'probationer' given in Rule 2.49 (chapter II) of the Punjab Civil Services Rules, Volume I, Part I (Main Rules), which runs thus:

> " 'probationer' means a Government servant employed on probation in or against a substantive vacancy in the cadre of a department. This term does not, however, cover a Government servant who holds substantively a permanent post in a cadre and is merely appointed 'on probation," to another post.
>
> Note 1. ... ...
>
> ... ...
>
> Note 2. No person appointed substantively to a permanent post in a cadre is a probationer unless definite conditions of probation have been attached to his appointment, such as the condition that he must remain on probation pending the passing of certain examinations.
>
> Note 3.—The provisions of this rule and note 2 above are to be taken as complementary and not as mutually exclusive. Taken together they contain the essence of the tests for determining when a Government servant should be regarded as a probationer, or as merely 'on probation' irrespective of whether he is already a permanent Government servant or is merely a Government servant without a lien on any permanent post. While a probationer is one appointed in or against a post substantively vacant within definite conditions of probation, a person on probation is one appointed to a post (not necessarily vacant substantively) for determining his fitness for eventual substantive appointment to that post. There is nothing in this rule to prevent a Government servant substantive in one cadre from being appointed (either through selection by a departmental committee or as a result of competitive examination through the Punjab Public Service Commission) as a 'probationer' in or against a post borne on another cadre, when definite conditions of probation such as the passing of departmental

examinations are prescribed. In such a case, the Government servant should be treated as a probationer....."

It is not disputed that the petitioner was directly recruited on probation in a substantive vacancy in the cadre of the Superior Judicial Service. He satisfies all the ingredients of the definition.

(88) The argument of Mr. Kaushal, however, is that his case falls under the second part of the definition and Note 2, because no definite conditions of probation had been attached to his appointment.

(89) The contention is devoid of force. The petitioner was appointed on probation for a definite period of two years which could be extended expressly by the competent authority, or by implication, so as not to exceed a total period of three years, and the condition was that he had to give a satisfactory performance with regard to his work and conduct during the period of his probation in order to qualify for confirmation.

(90) Mr. Kaushal referred to two judgments of this Court in *Sukh Raj Bahadur* vs. *The State of Punjab* (20) and *Muktul Singh* vs. *The State of Punjab* (21) of Falshaw and Dulat JJ. It is not necessary to discuss these rulings. They do not advance the case of the learned Advocate-General.

(91) Regarding contention (c), it may be observed that in Rule 9 of the Appeal Rules itself, the words 'appointment' and 'employment' have been used interchangeably. Such use of these words clearly shows that they have been used in the same sense. The impugned order had been passed under sub-rule (3) of Rule 10 of the 1963 Rules read with Article 233 of the Constitution. Though the word 'termination' has not been used in the impugned orders, yet to all intents and purposes, they have the effect of terminating the 'appointment' or 'employment' of the petitioner in the cadre of the Superior Judicial Service.

(92) Mr. Kaushal argued that Rule 9 is confined to cases of termination of services and not of reversion to the substantive rank. In this connection, he has cited a Single Bench judgment reported

(20) C.W. No. 467 of 1958 decided on 9th April, 1959.

(21) C.W. No. 515 of 1960 decided on 3rd April, 1961.

as Shanti Kusum Dass Gupta vs. *The Oil and Natural Gas Commission and others* (22), wherein Rule 55-B of the Central Services (Classification, Control and Appeal) Rules 1957, which is analogous to Rule 9 came up for interpretation. It was held that the aforesaid Rule 55-B does not apply to a reversion of a promotee probationer to his substantive post. The facts of the instant case are distinguishable from the facts of the *Shanti Kusum Dass Gupta's* case (supra). Shanti Kusum Das Gupta was a promotee whereas the petitioner, in the instant case, is a direct recruit from the Bar. It is immaterial if, as a member of the legal profession, he was holding the post of a District Attorney, under the Government. It is not correct to say that the case of the petitioner is not one of termination of his appointment under Rule 9 aforesaid but of his reversion, which is outside the purview of that Rule. It is true that there are some observations of the learned Judge in *Shanti Kusum Das Gupta's case* (22) (supra) to the effect : that this Rule is concerned with the cession of employment in Government service and not cession of employment in a particular post, which can be stretched to spell out the proposition that this Rule is not attracted so long as the fact of the termination of his services in the promoted rank does not have the consequence of throwing him out of the Government employment altogether. This will be a strange interpretation. If I may say so with respect, this is not the *ratio* in *Shanti Kusum Das Gupta's case* (supra). If this contention of Mr. Kaushal is accepted, then it may lead to absurd results. This will be clear by taking an extreme example. Suppose, the petitioner's substantive rank was that of a peon in a Government department, and on termination of his service as a probationer District Judge, he is reverted to his substantive rank. Could it be said that it was a case of reversion of the promotee to his substantive rank and not one of termination of his service in the promoted rank? I, therefore, negative the contentions of the learned Advocate-General and hold that the mandate of Rule 9 of the Appeal Rules was attracted with full force, and non-compliance with its mandatory provisions is fatal to the impugned orders terminating the service of the petitioner.

(93) The *fifth* question that falls for determination, is: "Whether the impugned orders operate as a punishment, and are violative of Article 311(2) of the Constitution, and the concepts of natural justice?" Before dealing with the contentions canvassed,

(22) A.I.R. 1970 Gujrat 149.

it will be useful to refer briefly to the law on the point, which has been settled by a bead-roll of Supreme Court decision commencing *with Parshotam Lal Dhingra* vs. *The Union of India* (23) and followed, among others, by:—

(1) *The State of Orissa and another* vs. *Ram Narayan Dass* (24).

(2) *Jagdish Mittar* vs. *The Union of India* (25).

(3) *Ranendra Chandra Banerjee* vs. *The Union of India and another,* (26).

(4) *Champaklal Chiman Lal Shah* vs. *The Union of India* (27).

(5) *The State of Punjab and another* v. *Sukh Raj Bahadur* (28) and

(6) *Ram Gopal Chaturvedi* v. *State of Madhya Pradesh* (29).

The basis authority is *Parshotam Lal Dhingra* v. *The Union of India* (23). Two of the five propositions laid down in that case are relevant for our purpose. They are:

(1) The termination of employment of a person, holding a post on probation, without any enquiry whatsoever, cannot be said to deprive him of any right to hold the post, and is, therefore, no punishment.

(2) If, instead of terminating such persons' services without any enquiry, the employer chooses to hold an enquiry into his alleged misconduct or inefficiency or for some similar reason, the termination of his services is by way of punishment because it puts a stigma on his competence and affects his future career. In such a case,

(23) A.I.R. 1958 S.C. 36.
(24) A.I.R. 1961 S.C. 177.
(25) A.I.R. 1964 S.C. 449.
(26) A.I.R. 1963 S.C. 1552.
(27) A.I.R. 1964 S.C. 1854.
(28) A.I.R. 1968 S.C. 1089=1968 S.L.R, 701.
(29) A.I.R. 1970 S.C. 158.

he is entitled to the protection of Article 311(2) of the Constitution.

Commenting on these propositions Gajendragadkar, J., in *Jagdish Mittar* V. *The Union of India* (25), observed:

"It would be noticed that these propositions were laid down in a case where the order of discharge on its face attributed stigma to the probationer whose services were discharged and it was preceded by an enquiry held with a view to decide whether the said probationer's services should not be terminated forthwith, and so, with respect, in appreciating the effect of proposition (3) as enunciated in the judgment, these material facts must be borne in mind. We do not think that the Court intended to lay down a broad and unqualified proposition that wherever any kind of enquiry is held by the authority before terminating the services of a probationer, the subsequent termination of such a probationer's services in whatever form it is couched, must always be deemed to amount to his dismissal. As we have already indicated, *almost in every case where the question of continuing the probationer or a temporary servant falls to be decided by the authority, the authority has necessarily to enquire whether the said probationer or temporary servant deserves to be continued and that may sometimes lead to an enquiry.* In fact, it would be an act of fairness on the part of the authority to make such an enquiry and give a chance to the servant concerned to explain his conduct before the authority reaches a conclusion in the matter. Such an enquiry is actuated solely by the desire to decide the simple question as to whether the temporary servant or the probationer should be continued or not, and is undertaken for that purpose alone without any desire to attach any stigma to him. *An enquiry of this character must be distinguished from the formal departmental enquiry* where charges are served on the servant and which is *undertaken* for the *purpose of punishing him,* otherwise it would lead to this anomalous result that in the case of a temporary servant or a probationer the authority must discharge him without enquiring into his alleged inefficiency or unsuitability but

if the authority chooses to act fairly and makes some kind of enquiry and gives an opportunity to the servant concerned to explain his alleged deficiency, the discharge becomes dismissal. We have no doubt that in laying down the third proposition, this Court did not refer to such informal enquiries and did not intend to take in cases of *simple and straightforward discharge of temporary servants* which follow such informal enquiry".

(94) The learned counsel for the petitioner contended that though in form, the impugned order issued and published in Government Gazette was innocuous and contained no stigma, yet the attendant circumstances give it a penal complexion. These circumstances, according to the counsel are: that an elaborate enquiry with fanfare was held by the Director, Special Enquiry Agency into the complaints alleged to have been made by Mangat Rai Gauba and Gurparshad, Government pleader, and as a result of that enquiry, the Governor passed a detailed order (Annexure R1/2) in which he recorded findings based on the Director's enquiry report, that some charges, such as of not preparing faithful record and committing serious irregularities had been proved. It is argued that by filing a copy of the Governor's order along with their return, the Government have given publicity to this, otherwise confidential record, containing a stigma against the petitioner.

(95) It appears to me that this contention cannot be accepted.

(96) The question, whether or not an order terminating the services of a probationer was made by way of punishment, is a question of fact depending on the circumstances of each case. Such circumstances have not been established in the present case. It is conceded that the impugned order which was issued to the petitioner and published in the Government Gazette, did not, on the face of it, carry any stigma or imputation, but was a simple straightforward order, terminating the services of the petitioner (probationer) from service in accordance with the conditions of his employment. The correspondence which passed between the State Government and the High Court, and the order (Annexure R1/2), read as a whole, indubitably show that the confidential enquiry made by the Government through the Director, Special Enquiry Agency, was not made with the object of removing or dismissing the petitioner from service, as a punishment, but merely for the purpose

of ascertaining his fitness or otherwise for confirmation. The Government could claim immunity for the Governor's order (copy Annexure R. 1/2) under Article 166 of the Constitution, but it waived that immunity in fairness to all concerned. The Governor's order is an elaborate, speaking and self-contained order. All the circumstances which culminated in the impugned order being passed, are stated in it. It should be read as a whole and it is not fair to take out an isolated sentence from it and read it out of context. It will be useful to reproduce the material portions of the order as it will have to be referred again while considering the question of *mala fides*. It reads:

> "I have carefully perused the relevant notings, correspondence between the High Court and the State Government, the report of the Director, Special Enquiry Agency, the report of the Sub-Committee of the Cabinet and the decision taken in the Council of Ministers at its meeting held on 20th June, 1973. The Council of Ministers has accepted the recommendation of the Sub-Committee, to revert Shri N. S. Rao to his substantive post of District Attorney. Because of the unfortunate confrontation that seems to have developed between the High Court and the State Government, I wanted to satisfy myself whether anything can be done even at this late stage, to avoid such confrontation. Although under the Constitution, I am bound by the advice of the Council of Ministers, I studied the file to see if there is any scope for me to advise the State Government to reconsider the matter with a view to avoid such confrontation.
>
> ... ...
> ... ...
>
> The decision of the High Court that Rule 10 is ultra vires of the Constitution is not a judicial decision but only an administrative decision. An administrative decision of the High Court must be considered with the respect it deserves, coming as it does from the High Court, but it is certainly not binding on the State Government like a judicial decision .....the State Government has also taken the legal opinion of the Advocate-General, Haryana, and the Additional Solicitor-General of the Government of India. Both have supported the stand of the State

Government..... Their view was that the authority competent to appoint must also be the authority competent to confirm ..... Since the Governor is undoubtedly the appointing authority in regard to District Judges, he must also be the sole authority to confirm the District Judges at the end of their probation, of course in consultation with the High Court.

"..... Probation means 'on trial' and no appointment on probation can be complete until confirmation of the probationer.

"I am inclined to agree with the stand of the Government...

"Next point, that I have to consider, is, whether the State Government has done every thing possible to consult the High Court, which is mandatory under rule 10, as also under Article 233 of the Constitution. From the correspondence it is clear that the Government had been repeatedly pressing for the views of the High Court..... Not having been allowed to see the conclusions of the High Court Judge who enquired into the complaints against Shri N. S. Rao, the State Government asked the Director, Special Enquiry Agency personally to make a confidential enquiry into these allegations, some of which were verifiable even from records. From the report of the Director, it appears that the probationer, Shri N. S. Rao, had committed some serious irregularities which made him unfit for confirmation. The Government, therefore, wrote to the High Court once again bringing these facts to its notice and giving reasons why it could not agree to the confirmation of this officer. It was also pointed out that the crucial period of three years would lapse on 7th July and a final decision as regards the confirmation of this officer must be taken before that date since otherwise, in accordance with the judicial rulings, the officer would be deemed to have been confirmed automatically. It was indicated in one of these letters that the Government proposed to revert this officer to his substantive post of District Attorney.

....

Even at that stage, if the High Court had shown the records and the enquiring Judge's report, Government might have understood how the High Court had exonerated the probationer of all charges against him. If the enquiring Judge's report had been made available even at that stage, Government might have found something to refute the conclusion they had reached on the basis of the Director, Special Enquiry Agency. It was quite conceivable that the Government might have, without prejudice to their stand, on merits, come to the conclusion that the officer was not unfit for confirmation. An open confrontation might then have been avoided..... The High Court..... ..... deferred consideration of the whole matter until the court re-opened on the 15th July, even though the Government had explained reasons for the urgency for taking a final decision before the 7th July, 1973, when Shri N. S. Rao would complete his maximum period of probation of three years. Nor did the High Court say that the view of the Government, that in the absence of a decision taken before the 7th of July, Shri N. S. Rao would be deemed to have been automatically confirmed, was wrong.....

"The High Court had, at least indirectly, given its views when it decided to confirm Shri N. S. Rao. The State Government, however, placed all the facts in its possession before the High Court and asked once again for its views. The High Court was not, however, prepared to give its final reply until after the reopening of the Court on 15th July, 1973. In these circumstances, I cannot find any fault with the Council of Ministers for not waiting any longer for the views of the High Court. The Government was left with no alternative but to act on the basis of information that was available to it..... ....

On this analysis, I cannot say that the State Government did not make adequate efforts either to obtain the views of the High Court or to avoid this confrontation. The next point that I have to consider is justified on merits. *It would be hard on the Officer, Shri N. S. Rao, if he becomes a victim of this unfortunate controversy* between the High Court and the Government, for no fault of his.

On this point, I find from the report of the Director, Special Enquiry Agency, that there is evidence from a number of lawyers to show that Shri N. S. Rao was not recording evidence strictly according to what the witnesses were deposing. This is a very serious matter. There is no reason to assume that all these lawyers were ill-disposed to Shri N. S. Rao. In any case, there seems to be no getting away from the fact that there are at least two case-records to show that Shri N. S. Rao had acted improperly and without jurisdiction. These facts, which are on record, show that either Shri N. S. Rao had acted in ignorance of law or that he had deliberately acted in contravention of law. In either case, such an officer hardly deserves confirmation. It is not known whether these cases had been examined by the Hon'ble Judge who held an enquiry into the allegations against Shri N. S. Rao and if so, what were his findings and how he had exonerated Shri Rao completely. Incidentally, Shri Mangat Rai Gaba, who had complained against Shri N. S. Rao, wrote a letter to the Governor dated 23rd April, 1973, in which he said that although he had made the complaint supported by affidavit, with full knowledge of the consequences in case the complaint was found false, frivolous or vexatious, when the High Court Judge came for the enquiry, he did not care to examine all his witnesses..... We have, however, no means of knowing whether that is so or not. A copy of this letter of Shri Gaba addressed to the Governor, was sent to the High Court on 10th May, 1973. ..... It is not known whether any action had been taken by the High Court, either to examine the remaining witnesses or to prosecute the complainant for swearing a false affidavit. On the material available to the Government and not knowing anything to the contrary, in the records in the possession of the High Court, I cannot, therefore, say that the action now proposed by the Council of Ministers not to confirm the probationer but to revert him to his substantive appointment, is unfair or improper.

I have *regretfully* come to the conclusion, that there is nothing I can do at this stage, to avoid this confrontation. Nor is there any way of postponing the decision. I, therefore, agree to the action proposed."

From a plain reading of the Governor's order, along with the correspondence that passed between the Government and the High Court, it is clear that the purpose of the enquiry made by the Government was only to find out the fitness or unfitness of the petitioner for confirmation. Such an enquiry, which is confidential and merely fact-finding and in which no charge-sheet is delivered to the probationer, does not attract Article 311(2). The tenure of a probationer, as already observed, is of a precarious nature. He has no right to hold the post. The Governor can terminate his employment, in consultation with the High Court, both during and on completion of his period of probation in accordance with the provisions of Rule 10(3) of the 1963 Rules. The observations in *Jagdish Mittar's case, ibid*, quoted above, fully cover the point under consideration.

The second case which I may refer is *Ram Gopal Chaturvedi* v. *State of Madhya Pradesh*. Chaturvedi was a temporary Civil Judge in Madhya Pradesh. Under rule 12 of the Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Services) Rules, 1960, the service of a temporary Government servant was liable to termination at any time by one month's notice by the appointing authority. The Chief Justice of Madhya Pradesh High Court, after inspecting his Court, dictated the following note:

> "During my recent visit to Gwalior, I probed into the matter of Shri R. G. Chaturvedi, Special Magistrate (Motor Vehicles), Gwalior, giving shelter to a girl named Kumari Laxmi Surve..... the enquiry made by me revealed that Shree Chaturvedi has been associating with this girl for over a year and his relations with her are not at all innocent. He is sheltering and supporting Miss Surve against the wishes of her father and other members of her family. ..... A report of this incident was also recorded in the Roznamcha-Am of Lashkar Kotwali .....Shri Chaturvedi did not enjoy good reputation at Morena and Kolaras where he was posted before his posting at Gwalior. Shri Bajpai, District Judge, Gwalior, also informed me that Shri Chaturvedi was not honest and that in collaboration with the Traffic Inspector he has taken money from accused persons in many cases under the Motor Vehicles Act."

No charge-sheet was served upon Chaturvedi, nor was any departmental enquiry held against him. The Madhya Pradesh High Court passed a resolution that the State Government should terminate

his services. Having regard to that resolution, the Governor passed an order terminating his services. It was contended before the Supreme Court in that case, as has been done before us, that the impugned order was passed by way of punishment without giving Chaturvedi an opportunity to show cause against the proposed action and was, therefore, violative of Article 311 of the Constitution. Counsel also drew attention of their Lordships to the enquiries made by the learned Chief Justice of Madhya Pradesh High Court and a brief admonishment administered to Chaturvedi for his disreputable conduct. Reliance also seems to have been placed on the note of the learned Chief Justice as premises for the argument. The Supreme Court repelled this contention in these terms:

> "On the face of it, the order did not cast stigma on the appellant's character or integrity, nor did it visit him with any evil consequences. It was not passed by way of punishment and the provisions of Article 311 were not attracted."

It was significantly added :

> "It was immaterial that the order was preceded by an informal enquiry into the appellant's conduct with a view to ascertain whether he should be retained in service."

The note recorded in *Chaturvedi's case* contained far more serious imputations, touching the integrity and conduct of the Government servant concerned, than those which are said to convey a stigma against the petitioner in the Governor's order. Nor can the impugned order be said to be violative of the principles of natural justice. There was no scope for the application of such principles which operate only in voids left in statutory provisions.

For all the aforesaid reasons, I negative this contention of the learned counsel for the petitioner.

The sixth question is, whether before framing and promulgating the Rules under Article 309 of the Constitution, it was incumbent on the Governor to consult the High Court. No provision of the Constitution or the statutory Rules has been brought to our notice which makes consultation with the High Court obligatory for the Governor before framing and issuing such Rules, though, as a matter of sound administrative policy, the Governor should, before

framing Rules for the Judicial Services of the State, consult the High Court. In the present case, before amending and promulgating the amendment on April 21, 1972, the Government did solicit the views of the High Court.

Nor is there any force in the contention that regulation of seniority is entirely a matter for the control of the High Court. This is a condition of service, which can be regulated by the Governor in the exercise of his legislative power under the proviso to Article 309 of the Constitution, though the fixation of seniority in accordance with such a rule would be a matter within the jurisdiction of the High Court. The view that the seniority in the Superior Judicial Service can be regulated by the Governor by framing a rule under Article 309, receives support from the dictum of the Supreme Court in *Chandramouleshwar Prasad* v. *The Patna High Court* (15).

This takes me to the allegations of *mala fides*. The petitioner's case is that at one time, when the Chief Minister, Shri Bansi Lal, Respondent 2, and the petitioner were students in the Law College, Jullundur, they had become fast friends. It was "through the good officers of the Chief Minister that the petitioner was appointed as Assistant Advocate-General in 1969". Again, "it was Respondent 2, who got the petitioner a handsome honorarium for successfully conducting the "Kairon Murder Case". When the petitioner was recommended by the High Court for the post of District and Sessions Judge, Respondent 2 felt very happy and again "it was he who was responsible for getting the petitioner's papers cleared within the shortest possible time thus paving the way to an early appointment by the Governor of Haryana". After making a general allegation that Respondent 2 expects his friends to be absolutely subservient to his interests, the petitioner proceeds that owing to certain "unfortunate factors" and circumstances, the petitioner and Respondent 2 "went on drifting away from each other," and the "petitioner became *persona non grata*" with Respondent 2. The circumstances, which are alleged to have made the Chief Minister (Respondent 2) harbour malice against the petitioner, according to him, are:—

(a) That the 1963 Rules were amended with retrospective effect to injure the rights of the petitioner, who was the only direct recruit in the Haryana Superior Judicial Service.

(b) (*Vide* para 4 of the petition): That the petitioner's father, Shri Gajraj Singh, veteran Congressman and

Parliamentarian, "had the reputation of having a complete hold in Districts Gurgaon and Mohindergarh." In the last general elections of 1971 to Lok Sabha, one Shri Nihal Singh a nominee of the Congress Party, was opposing Rao Birender Singh, from this Constituency. Respondent 2 expected the petitioner's father to actively canvass for the Congress candidate. The Petitioner's father, however, owing to his illness, did not do so and came over to stay with the petitioner at Karnal a few months before the elections. "Respondent No. 2 is reported to have blamed the petitioner for keeping his father away from the Ilaqa in order to help Rao Birender Singh, whom he considered to be one of his bitterest political adversaries."

(c) (i) (*Vide* para 5 of the petition). That on 30th June, 1971, Shri Ram Narain, father-in-law of the petitioner, was in the H.C.S. (Executive Branch). He was serving as Secretary of the Harayna State Electricity Board. On the 25th June, 1971, about four or five days before his retirement, Shri Ram Narain wrote a demi-official letter (copy Annexure 'B') to Shri P. N. Sahni, Chairman of the State Electricity Board, Haryana, bringing to the latter's notice the irregularities committed by one Shri Debi Parsanna, a member of the Haryana State Electricity Board, and Chairman of the Subordinate Staff Selection Committee, who was a trusted confident of Respondent 2. "Shri P. N. Sahni, took advantage of the situation and as his relations with Shri Ram Narain had earlier lost cordiality due to certain irregularities alleged to have been committed by him (Shri P. N. Sahni) in connection with Rural Electrification Programme of the Board, he poisoned the mind of Respondent 2 against the petitioner's father-in-law. Shri Sahni is extremely thick with Respondent 2 and the latter has got him Padam-Shri."

(ii) "As ill-luck would have it, certain very serious irregularities alleged to have been committed in the Rural Electrification Programme of Haryana State Electricity Board leaked out to the general public at large, and certain political opponents of Respondent 2, in particular. Respondent 2 was led to believe that all these facts had been allowed to be given out by Shri Ram Narain."

On 24th February 1972, Shri Bhagwat Dayal Sharma, M.P., "a bitter opponent of Respondent 2," submitted a lengthy memorandum to the President of India relating to the affairs of the Haryana State Electricity Board. "The memorandum was so detailed that Respondent 2 was presumably convinced that all this intimate information could have been given to Shri Bhagwat Dayal Sharma by the petitioner's father-in-law, who had by then retired from service."

(iii) To wreak vengeance upon the petitioner's father-in-law, the services of Nav Rattan Singh, another son-in-law of Shri Ram Narain, were terminated within a few months of his retirement.

(d) (*Vide* para 7 of the petition): That in the Assembly elections held in February, 1972, the petitioner's brother, Rao Surinder Singh, Advocate, Gurgaon, contested the election as an independent candidate from Gurgaon Constituency against one Shri Mahabir Singh, then a Minister in the Cabinet of Respondent 2. "This also upset Respondent 2, who carried his grievance not against the offending person alone, but also against all the members of his family, in this case the petitioner."

(e) (*Vide* para 6 of the petition): That in March, 1971, the petitioner had to try Sessions Case, *State* v. *Comrade Ram Piara and his two sons* under Sections 307/353, 332, Indian Penal Code. The defence plea in this case was that the local police Authorities, including the Superintendent of Police, Shri R. C. Sharma, and Deputy Superintendent of Police, Shri Tikka Singh, were on the look-out for an opportunity to teach Comrade Ram Piara a lesson for his being an uncompromising critic of the administration in general and the local Police in particular, that for this purpose they had specially brought Sub-Inspector Rishi Parkash, and that this officer and a few Constables had inflicted numerous injuries on Comrade Ram Piara. Another case also under sections 458/380/506/448, Indian Penal Code, was registered against Comrade Ram Piara and his companions. The petitioner by his judgments, dated 31st March, 1971, and 2nd August, 1971, acquitted

Comrade Ram Piara and the other accused, holding that these cases were false and manipulated by the Police. Severe strictures were passed by the petitioner against the Police, especially Sub-Inspector Rishi Parkash, Inspector Chanan Singh and the Prosecuting Inspector, Shri H. P. Tikku. No appeals were filed against these acquittals. "Respondent 2 has put down these acquittals of Comrade Ram Piara as an unforgivable offence against him personally."

(f) (*Vide* para 10 of the petition): That Shri Chanda Singh, now M.L.A., was once a Sarpanch of Gram Panchayat, Butana, and one Shri Kamal Nadu was the Block Development and Panchayat Officer, Nilokheri Block, which includes village Butana. In 1965 a report had been lodged with the Police that Chanda Singh had embezzled a sum of Rs. 5,000 approximately, which had been entrusted to him for development of fishery in his village. This case under section 409, Indian Penal Code, was still under investigation when the reorganisation of the State of Punjab took place in 1966. After his election as M.L.A., Chanda Singh, however, became a trusted lieutenant of Respondent 2. The result was that the criminal charges against Chanda Singh were withdrawn by the Police, who, however, challaned Kamal Nadu in court for trial for the alleged embezzlement. The trial of Kamal Nadu's case was to commence on 25th October, 1971, before the petitioner. Shri Chanda Singh was cited as a prosecution witness in that case. On that date, a special Session of the Haryana Legislative Assembly was to take place at Chandigarh. All the prosecution witnesses, excepting Shri Chanda Singh, were present. Chanda Singh was reported to be sitting with the Deputy Commissioner, Karnal, at his residence. Shri P. C. Bali, Sub-Divisional Magistrate, Karnal, came with a message from Shri H. V. Goswami, Deputy Commissioner, Karnal that the trial of the case be postponed to some other date as Shri Chanda Singh, who wanted to be present at the time of the examination of the material prosecution witnesses was to attend a hurriedly called Assembly Session, which was commencing in the afternoon of that very date. The petitioner expressed his inability to do so. However, as a

concession, the petitioner agreed to fix another date for the examination of Shri Chanda Singh. The petitioner was told that this did not satisfy Respondent 2, who had insisted that the entire trial be postponed. The petitioner was told that he will incur the displeasure of Respondent 2 if he did not postpone the trial.

(g) That Shri Hardwari Lal, MLA, and Shri Bhagwat Dayal Sharma, MP, raised the matter of treatment meted out by Respondent 2 to the petitioner. The former mentioned it in some detail in his Booklet, dated 22nd March, 1973, and the latter in his letter, dated 21st February, 1973, addressed to Sh. H. R. Gokhale, Law Minister. Respondent 2 wrote to the High Court (Respondent 3), complaining about the alleged use of political channels by the petitioner for the redress of his grievances. The fact, however, was that the petitioner had never talked to either of these politicians about his case. The High Court, by its communication, dated 3rd May, 1973, called for the comments of the petitioner in this matter. In his reply, dated 7th May, 1973, the petitioner submitted to Respondent 3 that he never had any occasion to talk about any matter whatsoever to Shri Bhagwat Dayal Sharma, M.P.

In his reply, Shri Bansi Lal, Chief Minister, Respondent 2, has emphatically refuted these allegations of *mala fides*. He has denied that prior to the petitioner's appointment as District and Sessions Judge on probation, his relations with the petitioner were friendly.

Mr. Jagan Nath Kaushal, learned Advocate-General, appearing for Respondents 1 and 2, has pointed out that these allegations have been made by the petitioner on the basis of some information received and believed to be true by him, but the source of such information has not been disclosed, with the result that the Court has no means of verifying the correctness of these charges, and that even the amended affidavit filed by the petitioner for removing the defect in verification, does not constitute legal evidence, as it does not comply with the requirements of Order 19, rule 3, Civil Procedure Code, and the principles laid down by the Supreme Court in *State of Bombay* v. *Purshottam Jog Naik* (30), and *State of Haryana* v. *Rajendra Sareen* (31).

(30) A.I.R. 1952 S.C. 317=1952 SCR 674.

(31) A.I.R. 1972 S.C. 1004.

There is force in this contention. Rule 3(1) of Order 19 of the Code of the Civil Procedure requires affidavits to be "confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statement of his belief may be admitted; provided that the grounds thereof are stated." In *Purshottam Jog Naik's case,* ibid, the Supreme Court ruled that verification of affidavits should invariably be modelled on the lines of Rule 3, Order 19 of the Code of Civil Procedure, whether the Code applies in terms or not, and when the matter deposed to is not based on personal knowledge, the source of information should be disclosed. This was reiterated by their Lordships in *Barium Chemicals Ltd. and another* v. *Company Law Board and others* (32) with reference to a case containing an averment of *mala fides.* It was observed:

> "It is true that in a case of this kind it would be difficult for a petitioner to have personal knowledge in regard to averment of *mala fides,* but then where such knowledge is wanting, he has to disclose his source of information, so that the other side gets a fair chance to verify it and make an effective answer."

In the instant case, the verification is conspicuous by the non-disclosure of such information with regard to almost all the allegations of *mala fides.*

Another principle to be borne in mind while considering a charge of *mala fides,* is, that such a charge is very easy to make but difficult to rebut. An inference of malice or illwill is not to be drawn unless such an inference is "reasonable and inescapable from proved facts," taken singly or collectively.

Keeping the above principles in mind, I proceed to examine the allegations of *mala fides.*

I will deal with allegation (a) a little later.

His Lordship considered other allegations of mala fide and then proceeded to consider allegation (a) about the amendment of the 1963 *Rules with retrospective effect.*

After stating that in September, 1971, it was proposed to change the rule regarding fixation of *inter se* seniority of the direct recruits

(32) A.I.R. 1967 S.C. 295.

and the promoted officers in the Service in such a manner that it could injure the rights of the petitioner, the petitioner alleged (*vide* para 8 of the petition):

> "Unfortunately there has always been an unreasonable feeling of discontent amongst the Service Members who came to the Service by promotion in an officiating capacity from the subordinate Judicial Service. This feeling is nothing new and is to be found in all the services, where recruitment is from different sources, direct appointment and promotion. So far as the Haryana Superior Judicial Service is concerned, this feeling became all the more pronounced during this period and there were repeated attempts to see that the petitioner did not get his rightful place in the service. In the strained relations that had developed between the petitioner and Respondent No. 2, the other members of the service got an immediate favourable response from Respondent No. 2, who at once sponsored their cause and agreed to go to the extent of amending the Rules of the Service in such a manner that the petitioner would lose his rightful position as the only direct recruit to the Service."

It may be noted that before this amendment, seniority, under Rule 12 of 1963 Rules, was governed by the date of confirmation in the Service, whereas under the amended Rule, the length of continuous service is the criterion for determining *inter se* seniority.

In reply to these allegations, Respondent No. 2, while admitting that these amendments had been made, categorically denied that they were actuated by any malice. The circumstances in which these amendments were promulgated, as stated by the Respondent are:

> "It is also correct that for long time since there had been a feeling of discontentment and frustration amongst the members of the subordinate Judiciary on account of the fact that on promotion to the Superior Judicial Service they were, under the existing rules, not receiving a fairdeal. It appeared to me that these rules were indeed operating to the serious prejudice and disadvantage of such promotees in so far as a direct recruit thereunder was eligible for

confirmation almost immediately after two years and at much younger age and in some cases before the expiry of this period while a promotee from the Subordinate Judicial Service appointed thereto on an officiating basis had to wait for a number of years before he could look forward to confirmation. A direct recruit thus ranked senior to a promotee and as a result was entitled to future opportunities in the shape of Selection Grade and elevation to the Bench in preference to a promotee I found no justification for such an unfortunate situation to perpetuate and therefore required the Administrative Department to go into the matter from the point of view of examining whether or not within the rules the length of continuous service on a post in the service irrespective of the date of confirmation could be made the basis of *inter se* seniority between direct recruits and promotees. The Administrative Department examined the matter accordingly and suggested necessary amendments in the rules for the purpose. Thereafter, the Chief Secretary submitted the case to me and I approved the proposed amendments to the rules on the 27th of September, 1971 being satisfied that the amendments would afford much needed relief to the promotees.

Draft of the proposed amendments to the rules was sent to the Haryana Public Service Commission and the Finance Department..... The Commission and the Finance Department agreed to the proposed amendments. The High Court despite reminders took long time to reply. By letter dated the 4th of April, 1972, the High Court conveyed their views to the effect that it was not possible for them to agree to the amendments proposed. The matter was again examined in the Administrative Department in the light of the reasons assigned by the High Court for disagreement. Thereafter, the case was referred to the Law Secretary for his advice. Both the Administrative Department an dthe Law Secretary expressed the view that the reasons assigned by the High Court were not persuasive enough and that the proposed amendments should be introduced into the Rules. The case was once again put up to me on the 14th of April, 1972. I agreed with their views and submitted the case to the Governor.

The Governor endorsed the adoption of the amendments. It may be submitted that this was also examined by the Council of Ministers and they also took the decision that the rules should be amended in accordance with the proposals..... The amendments to the rules were made for the sole purpose of removing the long standing and unmerited hardship to the promotees and to afford a fair deal to the Members of both the categories of the Service."

Shri A. Banerjee, Joint Secretary to Government, in his additional affidavit, dated 16th August, 1973, reiterated with elaboration:

"The revision of rules was taken in hand and finalised to remedy the simmering discontentment and frustration seeping the Judicial Service of the State. The cause of this malady lay in the manner in which the old Punjab Superior Judicial Service Rules were applied. The direct recruits, as a rule, were being confirmed at a much younger age than the promotees, the average age-gap between them being about 10 years. The seniority was being regulated by the order of confirmation. The direct recruits on their confirmation became senior to all the promotees who continued to remain officiating for good time, in some cases for as long as a period of 7 years. The injustice resulting to the promotees, was accentuated by the wrong practice in not recommending confirmation in their case even though vacancies for them were available with no object other than to confirm a direct recruit, who had not till then completed his period of probation. These facts are duly borne out from the gradation lists issued by the Government of Punjab and of Haryana as also the dates of confirmations available from the gazette notifications In this connection I invite the attention of the Hon'ble Court to the fact, already stated in the Counter-affidavit, that the petitioner himself was confirmed a day earlier than the promotees although permanent vacancies became available much earlier, to which promotees could have duly been confirmed..... The amendment of the rule regulating seniority from the date of confirmation to the date of continuous officiation on a post in the Superior Judicial Service is in line with the rules bearing upon the

subject prevailing in other States like Andhra Pradesh, Bombay, Gujrat, Bihar and Madras."

On the point as to why the rules were enforced with retrospective effect, the Joint Secretary, said:

"The amendment of the rules was made retrospective firstly because the question of conversion of temporary posts into permanent ones, was pending consideration since 1968 and the amendment of rules arose out of and was linked with the conversion of temporary posts into permanent ones. Moreover, the lien of the last direct recruit ceased in February, 1970, on confirmation of Shri (now Hon'ble Mr. Justice) A. D. Koshal, as puisne Judge of the High Court and thus amendment was made retrospective so as to take effect from 1st April, 1970, that is, the commencement of the financial year 1970-71."

The Learned Advocate General contends that these amendments were not made and given retrospective effect with a view to harm the petitioner, but to allay the discontent prevailing in the Judicial Service of the State with regard to the fixation of the *inter se* seniority of the promoted officers in the Superior Judicial Service vis-a-vis the direct recruits. Stress has been laid on the fact that even the petitioner has admitted in so many words that such frustration and feeling of discontent was there in the Service. He has adverted us to the affidavit of the Chief Minister and has pointed out that this was not a case where a final decision was taken for promulgating the amended rules by the Chief Minister, himself. The Chief Minister consulted the High Court which, unfortunately, did not agree, and then, the matter was considered by the Council of Ministers, by the Public Service Commission and finally, by the Governor. It is submitted that these rules were framed and promulgated by the Governor in exercise of his legislative power, as distinguished from executive power, derived directly from proviso to Article 309 of the Constitution. It is added that in exercise of that power the Governor was competent to give retrospective effect to these rules. Indeed, says Mr. Kaushal, it was not necessary to say expressly about the date from which these rules would come into force, because the petitioner was even on the date of the publication of these rules, on probation, and the amended rules would have applied to the case of the petitioner. Thus, neither on point of

law, nor on merits, concludes Mr. Kaushal, the rules can be assailed as *mala fide*. In support of his contention, he has referred to a Full Bench decision of the Kerala High Court, in *N. Srinivasan and another* v. *State of Kerala* (33).

It appears to me that the contention of Mr. Kaushal must prevail. In *Srinivasan's case* cited by Mr. Kaushal, the relevant law on the point has been succintly summed up by the Full Bench of the Kerala High Court, with which I am in respectful agreement, as follow:

> "The power conferred on the Governor by the proviso to Article 309 of the Constitution is a legislative power..... He does precisely what the State Legislature may do under the body of the article read with Entry 41 of List II of the Seventh Schedule although, of course, the powers of the State Legislature are wider having regard to the wider ambit of Entry 41. He derives his, legislative power directly from the Constitution, just as he does when making law under Article 213, and not from any mandate of the Legislature. When making such law, he is as much a legislative body as the legislature itself. Under Article 154, the executive power of the State is vested in him and under Article 163, he is aided and advised by his Council of Ministers in the exercise of his functions. That does not preclude him from functioning otherwise than as the executive. Article 168 makes him part of the legislature. The question is only one of competence (which, of course, includes conformance with the provisions of the Constitution) and not of motive, much less of expediency or even of propriety."

In *B. S. Vadera and another* v. *Union of India and another* (34), the Supreme Court also stated the law on the point thus:

> "The rules (made under proviso to Article 309 of the Constitution) made by the President or by such other person as he may direct, are to have full effect, both prospectively and restrospectively..... The rules, unless they can be impeached on grounds such as breach of Part III, or any other Constitutional provision, must be enforced, if made by the appropriate authority."

(33) A.I.R. 1968 Kerala 158.
(34) A.I.R. 1969 S.C. 118.

Again, in *The Income-tax Officer, Alleppey* v. *I.M.C. Ponnoose and others* (35), the Supreme Court laid down:

> "As the Legislature can legislate prospectively as well as retrospectively, there can be hardly any justification for saying that the President or the Governor could not be able to make rules in a manner so as to give them prospective and retrospective operation."

In view of the law enunciated above, the charges of *mala fides* made against Respondent No. 2, must fail particularly because these charges were not made against the Governor-in-Council of Ministers, who was the legislative authority. On merits also, this charge is not sustainable. It is a common ground that there was frustration and discontent in the subordinate Judicial Service with regard to the old rules which (according to Respondents Nos. 1 and 2), were considered to operate harshly against the promoted officers. It is not necessary to elaborate the point because this charge of *mala fide* with regard to the amendment of the rules, is not sustainable on the legal grounds mentioned above.

While concluding, I may reiterate that in making the impugned orders, or in amending the 1963 Rules, the final decision was not taken by Respondent 2, himself. The confirmation case of Shri N. S. Rao was considered first, by a Sub-Committee of Ministers, then by the Council of Ministers, and thereafter by the Governor personally. Similarly, the question of the amendment of the Rules was examined and considered by the various functionaries of the Government in the Secretariat, then by the Council of Ministers and thereafter by the Governor, who promulgated the same in the exercise of his legislative power derived directly from the Constitution. In these circumstances, I have no hesitation in holding that the impugned orders were not the result of *mala fides* of Respondent 2.

Before parting with the question of *mala fides*, I may note here that an application has been made on behalf of the petitioner, that the Chief Minister should be summoned and the petitioner allowed to cross-examine him with regard to the charge of *mala fides*. I do not think that the petitioner can be allowed to fish out new particulars or facts in this manner, which are not adumbrated in the petition. I would, therefore, dismiss C.M. 5288 of 1973.

(35) A.I.R. 1970 S.C. 385.

For all the foregoing reasons, I would hold—

(1) That the order of confirmation of a District/Additional District and Sessions Judge on probation has to be passed by the Governor in consultation with the High Court, and, in this view of the matter, the order of confirmation of the petitioner, passed by the High Court, was ineffective.

(2) That the charge that the impugned orders were the result of *mala fides* of Respondent 2, has not been substantiated.

(3) That the impugned orders were invalid, because—

(i) they were based on an enquiry conducted by the Director, Special Enquiry Agency, otherwise than through or with the concurrence of the High Court and, as such, were violative of Article 235 of the Constitution;

(ii) they had been passed without effective consultation with the High Court and were violative of Article 233 of the Constitution, and

(iii) the mandate of Rule 9 of the Punjab Civil Services (Punishment and Appeal) Rules, 1952, had not been complied with.

I would, therefore, quash the impugned orders (Annexures J., and J. 1) and allow this petition with costs, to be borne by Respondent 1.

B. R. TULI, J.—This case raises a number of constitutional and legal points apart from the allegation of *mala fides*. Some of these points involve the interpretation of Articles 233 and 235 of the Constitution of India and the validity of rule 10 of the Punjab Superior Judicial Service Rules, 1963 (hereinafter called the Rules), and have a great bearing and effect on the independence of the judiciary which was sought to be achieved by the Constitution makers as has been explained and emphasised in the various judgments of the Supreme Court and this Court, which have been noticed and relied upon in this judgment. I shall first state the facts bearing on the constitutional and legal points requiring determination keeping out the allegations of *mala fides*.

The petitioner, Shri Narinder Singh Rao, was appointed on probation, as District/Additional District and Sessions Judge by the Governor of Haryana in exercise of the powers conferred on him under rule 9 of the Rules, on the recommendation of the High Court, by order dated June 23, 1970, a copy of which is annexure R. 1/1 to the return filed by respondent 1. He was to remain on probation in accordance with the provisions of rule 10 of the Rules. In pursuance of that order, the petitioner assumed charge of his office on July 7, 1970. Rule 10 *ibid* provides a period of probation of two years for a direct recruit to the Service like the petitioner which may be extended by the Governor in consultation with the High Court so as not to exceed a total period of three years. The petitioner completed his two years of probation on July 7, 1972, during which period there was no complaint against him whatsoever. A complaint dated June 14, 1972, was sent by one Mangat Rai of Karnal to the Hon'ble the Chief Justice of this Court making various allegations against the petitioner. That complaint reached the Chief Justice on July 11, 1972, a day after the High Court re-opened after vacation. A copy of this complaint was sent to the Governor, Haryana and the Chief Minister of that State by Mangat Rai on August 2, 1972, for information and necessary immediate action. On September 25, 1972, the Haryana Government wrote a letter to the High Court requesting it to hold an enquiry into the various allegations contained in the complaint of Mangat Rai. The High Court had, however, before the receipt of that communication, appointed the Hon'ble Mr. Justice Gurnam Singh to hold the enquiry. Mr. Justice Gurnam Singh held the inquiry in November, 1972, and made his report exonerating the petitioner of all the charges levelled against him in January, 1973. That report was considered by the Hon'ble the Chief Justice and the Judges of the High Court in a meeting held on March 15, 1973, and it was decided to accept the same. Since the High Court was of the opinion that the power to confirm a District and Sessions Judge on probation rests with the High Court, the decision confirming the petitioner with effect from March 30, 1973, was taken in the meeting held on that date and in pursuance thereto the order confirming the petitioner was published under notification No. 110-GAZ. VI F. 9 dated April 18, 1973, in the Haryana Government Gazette dated May 1, 1973. At a subsequent meeting of the Hon'ble the Chief Justice and the Judges of the High Court held on May 4, 1973, it was decided to confirm the petitioner as District and Sessions Judge (Substantive permanent) with effect from July 7, 1972, instead of March 30, 1973, and five

other promoted officers were confirmed as District and Sessions Judges (substantive permanent) with effect from July 8, 1972, and a consolidated notification No. 124-GAZ. VI. F. 10 dated May 4, 1973, was published in the Haryana Government Gazette dated May 15, 1973, in respect of all of them.

The petitioner had originally been appointed as Additional District and Sessions Judge, Karnal, on July 7, 1970, and by order dated September 5, 1972, he was appointed as officiating District and Sessions Judge, Karnal, in place of Shri Ved Parkash Aggarwal. The State Government did not relish this appointment of the petitioner and the Chief Minister wrote a letter to Shri H. R. Gokhale, Minister for Law and Justice and Company Affairs, Government of India, on October 24, 1972, complaining that a comparatively young officer in the Superior Judicial Service had been appointed District and Sessions Judge.

On October 13, 1972, the Chief Secretary to Government, Haryana, wrote a letter to the Registrar of this Court refusing to notify the appointment of the petitioner as District and Sessions Judge, Karnal, in the Haryana Government Gazette on the ground that he was comparatively a very junior officer. In this letter it was also pointed out—

> "Shri N. S. Rao had been appointed as Additional District and Sessions Judge on probation for two years with effect from 7th July, 1970, but the "High Court have not yet intimated to the State Government whether Shri Rao has completed the probation period satisfactorily and is considered suitable for confirmation or whether it is considered desirable to extend the probation period."

It was further stated that—

> "the State Government feel that an Additional District Judge can be appointed as District Judge only by the Governor in consultation with the High Court under Article 233 of the Constitution of India. The State Government had not received any proposal from the High Court for the appointment of Shri N. S. Rao, as District and Sessions Judge by the Governor under the aforesaid Article."

Finally, it was requested that this Court might consider the desirability of revising the order of appointment of the petitioner as District

and Sessions Judge in view of the position stated in the letter. With this letter began the conflict between the High Court and the State Government with regard to the authority over the District Judges. In another D.O. letter dated February 13, 1973, written by the Deputy Secretary to Government, Haryana, Political and Services Department, to the Registrar of this Court, it was requested that the State Government may be informed whether the petitioner had satisfactorily completed the period of probation of two years and was considered suitable for confirmation or whether the period of probation should be extended. In his D.O. letter dated March 8, 1973, the same Deputy Secretary asked the Registrar of this Court to send the result of the enquiry including the report of the Officer deputed for the enquiry along with the record about the work and conduct of the petitioner so that a decision might be taken in respect of the confirmation of the petitioner. By D.O. letter dated April 10, 1973, the Registrar of this Court informed the Deputy Secretary to Government, Haryana, Political and Services Department, that in the opinion of the Hon'ble the Chief Justice and the Judges of this Court—

> "the matter of confirmation of Shri N. S. Rao and other promotees from the H.C.S. lies with the High Court and not with the State Government. Rule 10(2) of the Superior Judicial Service Rules is *ultra vires* the provisions of Articles 233 and 235 of the Constitution and has, therefore, to be ignored."

The Registrar made mention of some decisions of the Supreme Court on the basis of which the High Court had formed that opinion,. In the end it was stated—

> "In view of the above circumstances, it has been decided that Shri N. S. Rao, having successfully completed the period of his probation, is confirmed in the post of District and Sessions Judge with effect from 30th March, 1973. A regular notification is being issued, a copy of which will be forwarded to you for information.
>
> With regard to the complaint made by Shri Mangat Rai Gabba of Karnal against Shri N. S. Rao, an enquiry was held and it was found that the allegations in the complaint were not substantiated. Since this matter is within the exclusive jurisdiction of the High Court, it is regretted that

a copy of the enquiry report is not necessary to be supplied to the State Government."

The Deputy Secretary, in his D.O. letter dated April 13, 1973, in reply to the Registrar's D.O. letter dated April 10, 1973, stated that—

"the State Government have noted with great regret that the High Court have taken what appears to them a wholly untenable and unconstitutional position with regard to the competence of the High Court to order confirmation of members of the Superior Judicial Service. Instead of sending their views regarding the satisfactory completion of the probation period or otherwise by Shri N. S. Rao, the High Court have assumed unto themselves the authority vested in the Governor under Article 233 of the Constitution and have held rule 10(2) of the Punjab Superior Judicial Service Rules, 1963, as *ultra vires* while dealing with the matter on the administrative side. These rules are being acted upon for the last about ten years without any demur and no one had questioned their validity till now."

It was further pointed out that—

"Since the Governor is the appointing authority of District Judges under Article 233 of the Constitution, the authority to confirm such appointees (whether appointed by direct recruitment or by promotion) vests, under the same logic, with the Governor and not with any other authority. The Governor has to pass an order in this behalf after consulting the High Court with regard to the successful completion or otherwise of the probation period and thereafter he is fully competent to confirm a direct recruit or extend the probation period (up to a maximum period of three years) or dispense with the services of such direct recruit without assigning any reason.

The State Government is thus of the view that rule 10(2) of the Punjab Superior Judicial Service Rules, 1963, is *intra vires* the provisions of the Constitution and cannot be brushed aside by the High Court in this arbitrary manner."

A request was made that the High Court might reconsider the matter and withhold the issuance of the notification confirming the

petitioner and since the Governor alone was competent to take this action under rule 10(2) *ibid*, the High Court should send the complete record about the work and conduct of the petitioner to enable him to take an appropriate decision in the matter. The request for the supply of the copy of the enquiry report was repeated in order to enable the Government to see the basis on which the findings had been arrived at by the Enquiry Officer and whether there was any need to pursue the matter further. The State Government was further of the opinion that there did not appear to be any cogent reason as to why the detailed findings arrived at in the enquiry could not be divulged even confidentially to the State Government This letter was replied to by the Registrar by his D.O. letter dated May 4, 1973, in which it was pointed out that—

> "While first appointing and then confirming Shri N. S. Rao as District Judge, the High Court was of the opinion that he had successfully completed the period of his probation on the consideration of the entire record of his service and there was no necessity of any further extension of the period of probation. In their Lordships' view, rule 10(2) of the Superior Judicial Service Rules is *ultra vires* and should be deleted."

As regards the Enquiry Officer's report, it was pointed out that—

> "According to the Supreme Court's judgments, the disciplinary control vests in the High Court and since the High Court has come to the conclusion that no further action is necessary, it seems unnecessary to send a copy of the Enquiry Officer's report as no action is required to be taken by the State Government in this matter."

It was also reiterated that the High Court was of the opinion that the power to confirm a promoted officer as District Judge also lay with the High Court and in exercise of that power the cases of confirmation of Sarvshri Mool Raj Sikka, B. S. Yadav, Ved Parkash Aggarwal, Amar Nath Aggarwal and Salig Ram Bakshi (reitered with effect from 13th October, 1972,) had been considered and orders of confirmation passed. The Deputy Secretary sent a reply to this letter of the Registrar by a D.O. letter dated May 26, 1973, in which the point of view of the Government was reiterated and that of the High Court negatived.

The net result was that the High Court claimed that the power to confirm the direct recruits as well as promotees in the Superior Judicial Service vested in the High Court and not in the Governor and, therefore, the Governor, or the State Government had no say in the matter and secondly, the disciplinary control having been vested in the High Court by the Constitution, the State Government was not entitled to a copy of the Enquiry Officer's report exonerating the petitioner because no action was to be taken by the State Government in that behalf.

The State Government, however, was of the opinion that the claim of the High Court was not tenable and, therefore, it directed Kanwar Randip Singh, Inspector General of Police and Director, Special Enquiry Agency, to hold an enquiry into the charges levelled against the petitioner by Mangat Rai and Gur Parshad, District Attorney, Karnal, in his communication to the Legal Remembrancer dated June 12, 1972. It is admitted in the return that the charges into which enquiry was ordered by the State Government were the same which had been communicated to the High Court and which were enquired into by Mr. Justice Gurnam Singh. Kanwar Randip Singh made the enquiry without associating the Petitioner and without obtaining his explanation to the charges and submitted a report to the State Government which was considered in a meeting of the Council of Ministers. It was decided to form a Sub-Committee to go into the matter and make a report. The Sub-Committee consisted of Shri K. L. Poswal, Shri Ram Saran Chand Mittal and Shri Maru Singh, Ministers, who recommended that the petitioner should not be confirmed. That recommendation was accepted by the Council of Ministers and the case was sent to the Governor for passing an appropriate order. A copy of the order of the Governor dated June 21, 1973, has been filed by the State Government as annexure R. 1/2 to its return wherein he agreed with the action proposed against the petitioner, that is, reverting him to his substantive post as District Attorney and removing him from the Superior Judicial Service. Two notifications were issued on June 23, 1973, copies of which are annexures 'J/1' to the writ petition. Annexure 'J' reads as under:—

"ORDER OF THE GOVERNOR OF HARYANA.

In exercise of powers conferred under Article 233 of the Constitution of India and rules 10(3) of the Punjab Superior

Judicial Serivce Rules, 1963, the Governor of Haryana is pleased to revert Shri N. S. Rao, District and Sessions Judge, Ambala, to his substantive post of District Attorney, with immediate effect.

On his reversion as District Attorney, Shri N. S. Rao is posted as District Attorney, Rohtak, in place of Shri R. K. Gupta, whose orders of posting are in issue separately."

The other notification of that date reads as under:—

"GENERAL ADMINISTRATION DEPARTMENT
(GENERAL SERVICES)

NOTIFICATION.

The 23rd June, 1973.

No. 3770-3 GSL-73/16201.—Consequent upon the order of Governor Haryana dated 21st June, 1973, reverting Shri N. S. Rao, District and Sessions Judge, Ambala, to his substantive post of District Attorney, having been served on him, Shri N. S. Rao ceased to be a member of Haryana Superior Judicial Service with effect from 23rd June, 1973, (forenoon)."

The allegation of the petitioner is that copies of these orders were never served on him as he was on vacation from June 18 to July 8, 1973. On his return from leave he came to know of these orders and found them in the Haryana Government Gazette. He then filed the present petition challenging those orders.

To this petition, the State of Haryana, Ch. Bansi Lal, Chief Minister, Haryana, and the High Court through the Registrar have been made respondents. All these respondents have filed their written statements, and the petitioner has filed replications to the written statements of respondents 1 and 2.

This petition came up for hearing before a Bench of three Judges before whom it was contended that the case of *Inder Parkash Anand* v. *The State of Haryana and others,* (17) had not been correctly decided. Since that decision was rendered by a Bench of three Judges, it was felt that this case should be heard by a larger Bench. This is how this petition has now come up for hearing before this Bench.

The most crucial point requiring determination in this case is: who has the power to confirm a member of the Superior Judicial Service on probation against a permanent post? In other words, whether this power vests in the High Court or rests with the Governor. The Articles of the Constitution bearing on the point are Articles 233, 235 and 236, which are reproduced below:—

"233 (1). 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.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district Judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

235. The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

236. In this Chapter—

(a) the expression 'district judge' includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge;

(b) the expression 'judicial service' means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge."

The provision with regard to confirmation is contained in rule 10 of the Superior Judicial Service Rules, which reads as under:—

"10. *Probation.*—(1) Direct recruits to the Service shall remain on probation for a period of two years, which may be so extended by the Governor in consultation with the High Court, as not to exceed a total period of three years.

Provided that the Governor may in exceptional circumstances of any case, after consulting the High Court, reduce the period of probation.

(2) On the completion of the period of probation the Governor may, in consultation with the High Court, confirm a direct recruit on a cadre-post with effect from a date not earlier than the date on which he completes the period of probation.

(3) If the work or conduct of a direct recruit has, in the opinion of the Governor, not been satisfactory, he may, at any time, during the period of probation or the extended period of probation, if any, in consultation with the High Court, and without assigning any reason, dispense with the services of such direct recruit."

The other relevant rules are 2(1), 2(2), 2(5), 2(7), 4 and 9 which are reproduced hereunder:—

2(1). 'appointment to the Service' means an appointment to a cadre post, whether on permanent, temporary or officiating basis, or on probation;

(2) 'cadre post' means a post, whether permanent or temporary, in the Service;

(5) 'member of the Service' means a person—

(a) who, immediately before the commencement of these rules, holds a cadre post, whether on permanent, temporary or officiating basis, or on probation, or

(b) who is appointed to a cadre post in accordance with the provisions of these rules;

(7) 'Service' means the Haryana Superior Judicial Service.

4. *Appointing Authority.*—All appointments to the Service shall be made by the Governor in consultation with the High Court.

9. *Appointment of direct recruits.*—(1) No person shall be eligible for direct recruitment unless he—

(i) is not less than 35 years and not more than 45 years of age on the first day of January next following the year in which his appointment is made;

(ii) has been for not less than 7 years an Advocate or a Pleader and is recommended by the High Court for such appointment.

(2) No person who is recommended by the High Court for appointment under sub-rule (1) shall be appointed unless he is found physically fit by a Medical Board set up by the Governor and is also found suitable for appointment in all other respects."

In order to decide the question set out above, it has to be determined; what is the meaning of 'appointment' and 'promotion' in clause, (1) of Article 233 of the Constitution? This matter has been authoritatively decided by their Lordships of the Supreme Court in *The State of Assam and another* v. *Kuseswar Saikia and others,* (1). Their Lordships said that—

"appointment as well as promotion of persons to be District Judges is a matter for the Governor in consultation with the High Court and the expression 'District Judge' includes an additional District Judge and an additional Sessions Judge. It must be remembered that District Judges may be directly appointed or may be promoted from the subordinate ranks of the judiciary. The Article is intended to take care of both. It concerns *initial* appointment and *initial* promotion of persons to be either District Judges or any of the categories included in it. Further promotion of District Judges is a matter of control of the High Court. What is said of District Judges here applies equally to additional District Judges and additional Sessions Judges." (emphasis mine).

According to this observation, the Governor in the instant case was only concerned when he made the appointment of the petitioner as

District/Additional District and Sessions Judge in June, 1970. That appointment was the initial appointment of the petitioner to the cadre of District Judges and to a cadre post in the Superior Judicial Service, as per the definitions of 'appointment to the Service', 'cadre post', 'member of the Service' and 'Service in clauses (1), (2), (5) and (7) of rule 2 of the Rules, set out above, and the power to appoint of the Governor under Article 233 of the Constitution came to an end. From that point onwards, the petitioner became a member of the Service and his career therein began under the exclusive and complete control of the High Court. The powers of the Governor from that point onwards *to deal* with the petitioner ceased for every purpose other than for passing an order making the petitioner quit the Service by removal or dismissal under Article 311(2) of the Constitution. I wish to emphasise that this power to remove or dismiss is exercisable under Article 311(2) of the Constitution and not under Article 233 as a part of the power to appoint of the Governor. The power under Article 311(2) of the Constitution can also be exercised only on the initiation and recommendation of the High Court which alone has the power to initiate the disciplinary proceedings, hold the enquiry and find a case of dismissal or removal. The Governor on his own cannot do so. For continuing the petitioner in service, no order was necessary to be passed by the Governor. That was to be done by the High Court alone. The order of confirmation is an order of that kind, which had to be passed by the High Court alone after satisfying itself that the work and conduct of the petitioner during the period of his probation were satisfactory.

The power to discharge a probationer from service on the ground that his work and conduct during the period of probation were not satisfactory cannot be given to the appointing authority by virtue of the provisions of section 16 of the General Clauses Act, 1897, which by virtue of the provisions of Article 367 of the Constitution, applies to the interpretation thereof. That section only talks of 'suspend' or 'dismiss'. It does not take note of discharge from service of a probationer on the basis of unsatisfactory work and conduct or on account of retrenchment or otherwise than by way of punishment or discipline. Such a power is to be gathered from the service Rules governing the Government employee concerned. The validity of sub-rules (2) and (3) of rule 10 of the Rules cannot be supported on the basis of section 16 of the General Clauses Act.

In *The State of Assam* v. *Ranga Muhammad and others,* (3) their Lordships dealt with the meaning of the word 'posting' in

Article 233 of the Constitution and held that it meant the assignment of an appointee or promotee to a position in the cadre of District Judges. The pertinent observation of their Lordships are contained in paras 9 and 10 of the report and are as under:—

> "In its ordinary dictionary meaning the word 'to post' may denote either (a) to station some one at a place, or (b) to assign someone to a post, i.e., a position or a job, especially one to which a person is appointed.....
> In Article 233 the word 'posting' clearly bears the second meaning. This word occurs in association with the words 'appointment' and 'promotion' and takes its colour from them. These words indicate the stage when a person first gets a position or job and 'posting' by association means the assignment of an appointee or promotee to a position in the cadre of District Judges.....
> .....the word 'posting' cannot be understood in the sense of 'transfer' when the idea of appointment and promotion is involved in the combination. In fact, this meaning is quite out of place because 'transfer' operates at a stage beyond appointment and promotion. If 'posting' was intended to mean 'transfer', the draftsmen would have hardly chosen to place it between 'appointment' and 'promotion' and could have easily used the word 'transfer' itself. It follows,therefore, that under Article 233, the Governor is only concerned with the appointment, promotion and posting to the cadre of District Judges but not with the transfer of District Judges already appointed or promoted and posted to the cadre. The latter is obviously a matter of control of District Judges which is vasted in the High Court.....
>
> This is, of course, as it should be. The High Court is in the day to day control of Courts and knows the capacity for work of individuals and the requirements of a particular station or Court. The High Court is better suited to make transfers than a Minister. For, however well-meaning a Minister may be, he can never possess the same intimate knowledge of the working of the judiciary as a whole and of individual Judges, as the High Court. He must depend on his department for information. The Chief Justice and his colleagues know these matters and deal with them personally. There is less chance of being influenced by

secretaries who may withhold some vital information if they are interested themselves. It is also well known that all stations are not similar in climate and education, medical and other facilities. Some are good stations and some are not so good. There is less chance of success for a person seeking advantage for himself if the Chief Justice and his colleagues, with personal information, deal with the matter, than when a Minister deals with it on notes and information supplied by a secretary. The reason of the rule and the sense of the matter combine to suggest the narrow meaning accepted by us. The policy displayed by the Constitution has been in this direction as has been explained in earlier cases of this Court. *The High Court was thus right in its conclusion that the powers of the Governor cease after he has appointed or promoted a person to be a District Judge and assigned him to a post in cadre.* Thereafter, transfer of incumbents is a matter within the control of District Courts including the control of persons presiding there as explained in the cited case."

(emphasis mine).

If we read the word 'confirmation' in place of 'transfer' in the observations of their Lordships, the matter becomes absolutely clear. It was said by their Lordships of the supreme Court in *The State of Assam and another* v. *S. N. Sen and another,* (8) that the above observations apply with greater force to the case of promotion. On the same analogy I am of the opinion that these observations apply with greater force to the case of confirmation as well. Like transfer, confirmation operates at a stage beyond appointment and promotion, that is, during or at the expiry of the period of probation. The Governor is, therefore, not at all concerned with confirmation which takes place some time after initial appointment and on the scrutiny of the service record of the probationer so as to find whether his work and conduct have been satisfactory entitling him to continue in service and to confirmation therein.

In *The State of West Bengal and another* v. *Nripendra Nath Bagchi,* (2) their Lordships traced the history of Articles 233 to 237 of the Constitution and stated the reasons why the Judicial Services were provided for separately from other Services in the Constitution. It was observed that the Judicial Services were provided for separately

to make the office of a District Judge and the members of the Judicial Service, as defined in Article 236 of the Constitution, completely free of executive control and that Article 235 vested in the High Court the complete control over District Courts and Courts subordinate thereto. These observations have been repeated in later decisions, e. g. *The State of Assam and another* v. *Kuseswar Saikia and others* (1) (supra) *and The State of Assam and another* v. *S. N. Sen and another,* (8) (supra). The meaning of the word 'control' as used in Article 235 of the Constitution was also explained and it was held that the word 'control' included disciplinary jurisdiction. It was further observed in para 13 of the report that—

> ".....the history which lies behind the enactment of these Articles indicates that 'control' was vested in the High Court to effectuate a purpose, namely, the securing of the independence of the subordinate judiciary and unless it included disciplinary control as well, the very object would be frustrated. This aid to construction is admissible because to find out the meaning of a law, recourse may legitimately be had to the prior state of the law, the evil sought to be removed and the process by which the law was evolved. The word 'control', as we have seen, was used for the first time in the Constitution and it is accompanied by the word 'vest' which is a strong word. It shows that the High Court is made the *sole* custodian of the control over the judiciary. Control, therefore, is not merely the power to arrange the day to day working of the Court but contemplates disciplinary jurisdiction over the presiding Judge. Article 227 gives to the High Court superintendence over these courts and enables the High Court to call for returns etc. The word 'control' in Article 235 must have a different content. It includes something in addition to mere superintendence. It is control over the *conduct* and *dicipline* of the Judges. This conclusion is further strengthened by two other indications pointing clearly in the same direction. The first it that the order of the High Court is made subject to an appeal if so provided in the law regulating the conditions of service and this necessarily indicates an order passed in disciplinary jurisdiction. Secondly, the words are that the High Court shall 'deal' with the Judge in accordance with his rules of service and the word 'deal' also points to disciplinary and not mere administrative jurisdiction." '(emphasis mine).

These observations clearly show that the High Court has both administrative and disciplinary control by virtue of the provisions of Article 235 of the Constitution over the District Judges and the Courts subordinate thereto which are defined as Judicial Services in Article 236. In order to confirm a probationer an opinion has to be formed whether he has completed the period of his probation satisfactorily, that is, whether his work and conduct during that period have been satisfactory. The word 'conduct' has been expressly used by their Lordships in *Nripendra Nath Bagchi's case,* (2) (supra) and along with it the word 'disciplinary' is also used. Thereafter, their Lordships also referred to the use of the word 'deal' and what it means. All these cases were considered by a Full Bench of this Court, or which I was a member, in *Inder Parkash Anand.,* v. *The State of Haryana and others,* (17). The question for decision in that case was whether the High Court or the Governor was competent to retire a member of the Judicial Service at the age of 55 years instead of 58 years under rule 5.32 of the Punjab Civil Services Rules and it was held (p. 719) that—

> "The fixation of the age of superannuation is certainly the right of the State Government but the curtailment of that period under another rule govering the conditions of service is a matter pertaining to disciplinary control as well as administrative control. Disciplinary control does not mean only the jurisdiction to award punishment for a misconduct. It also embraces the power to determine whether the record of a member of the Service is satisfactory or not so as to entitle him to continue in service for the full term till he attains the age of superannuation or to prematurely terminate his service in accordance with the Service Rules. Pre-mature retirement, no doubt, does not amount to a punishment nor can it be considered as a dismissal or removal from service but it has to be determined on the basis of the service record and a conscious misconduct. It also embraces the power to determine the full tenure of his service or not. The pre-mature retirement is ordered to chop off the dead wood when it is felt that member of the Service who has attained the age of 55 years, is not efficient enough to continue further in service. Such a decision is, therefore, made in the exercise of both administrative and disciplinary jurisdiction. It is administrative because it is decided in public interest

to retire him pre-maturely and it is disciplinary because a decision is taken that he does not deserve, for whatever reason, to continue in service up to the normal age of superannuation and that it is in the public interest to drop him out earlier. In these circumstances, it cannot be said that when all kinds of control, administrative, judicial and disciplinary, vest solely in the High Court, that Court cannot have any say in the matter of pre-mature retirement of a member of the Judicial Service. The High Court cannot be equated with a department of the State Government so as to plead that its opinion or recommendation is not binding on the State Government in the matter of pre-mature retirement of a member of the Judicial Service of the State."

After referring to *the State of Assam* v. *Ranga Muhammad and others* (3) (supra), it was further observed :

"Such a power can only be exercised by the High Court and not by the State Government. The State Government has only to pass an order to that effect on the recommendation of the High Court. In other words, the decision is to be of the High Court which has to be carried out or given effect to by the State Government. Such a recommendation of the High Court should be considered as binding on the State Government as the High Court and not the State Government is the head of the State judiciary and it is the jurisdiction of the High Court to control the conduct and the working of the Courts and their presiding officers subordinate to it. This result automatically follows from the provisions of Article 235 of the Constitution vesting complete control over the subordinate judiciary in the High Court."

Lastly, it was observed:—(p. 728) that—

"after a person is appointed to the Judicial Service of a State, the State Government becomes *functus officio* and the entire control—administrative, judicial and disciplinary—vests in the High Court and as long as that officer remains in service, all orders *qua* him in respect of his service have either to be passed by the High Court or by the State Government only on the recommendation of the

> High Court in respect of the matters over which the State Government has been given the jurisdiction under the provisions of the Constitution or the conditions of service governing the Judicial Service. The State Government on its own initiative cannot pass any order. In the present case, the impugned order has not been passed on the recommendation or initiation of the High Court, but by the State Government on its own initiative against the recommendation of the High Court and is, therefore, liable to be struck down."

In order to confirm a member of the Superior Judicial Service on probation during or after the expiry of that period it has to be determined whether his work and conduct have been satisfactory and that can be done only by the High Court, which alone knows about it. Confirmation in the Service, in my view, means the decision by the competent authority as to whether the person on probation deserves to be continued in service or his service should be dispensed with. That decision has to be made on the determination whether his work and conduct during the period of probation have been satisfactory. The observations in *Inder Parkash Anand's* case set out above, clearly lead to the conclusion that such a determination falls within the ambit of administrative and disciplinary control which vests solely in the High Court. It follows, therefore, that the High Court alone has the power to confirm a member of the Superior Judicial Service on probation and the Governor has no say in the matter.

At this stage, it will be appropriate to determine the meaning of the word 'confirm' or confirmation'. The word 'confirm' etymologically comes from the old French and Latin 'Confermere' meaning thereby 'to make firm' or' 'strengthen' 'Confirmation' in such a case includes some element of application of mind and some consequential and necessary correction. In *Dodge* v. *Blood* (36), it was held by the Supreme Court of Michigan, that the word 'confirm' itself points retrospectively to something done and finished in the past. 'Confirmation' is not initiation, inauguration or commencement. It has not the force of adoption, ratification or acceptance.

In *Continental Illinois Nat. Bank and Trust Co. of Chicago* v. *Art Institute of Chicago* (37), it was held that the word 'confirm'

(36) 300 N.W. 121.

(37) 94 North-East Reporter 2d Series 602.

should not be construed as in itself serving a dispositive or donative purpose, but as approving an existent contract, grant or donation. It is, therefore, apparent from the meaning of the word 'confirm' that the confirmation of an appointee in service takes place after his initial appointment to the Service and by itself it does not constitute appointment. The appointment means the first getting of a position or job and posting means the first assignment to the cadre and, therefore, confirmation of the petitioner means his retention in the cadre which necessarily happens at a stage subsequent to the stage of appointment. It is also to be noted that an appointee does not start new service after confirmation, but he continues in the same service to which he was appointed and is entitled to all the benefits of the service on probation which is considered a part of his approved service for purposes of promotion, increment, pension, etc.

Let us look at the matter from another angle and see if confirmation can be considered as a step in the process of promotion because promotion in the cadre admittedly rests with the High Court alone. The various meanings of the word 'promotion' given in the Oxford English Dictionary, are advancement in position; preferment; the action of helping forward; the fact or state of having helped forward; furtherance; advancement; encouragement; advance; getting on; progress made. Confirmation of an appointee can reasonably be considered as a step towards promotion because it advances his position and makes it better and firmer. By confirmation he definitely goes one step forward in his service. As a probationer, he has no right to the post and his tenure is precarious; confirmation strengthens his position and puts it beyond dispute with the result that he comes to hold a lien on that post thereafter. Promotion after appointment, according to the decisions of the Supreme Court, is a matter of control which lies with the High Court alone. The conclusion is that confirmation is not a part of the appointment as it only makes firm the appointment already made; it pertains to the domain of control and promotion which exclusively and completely vest in the High Court according to various decisions of the Supreme Court referred to in this judgment and can be made by the High Court alone without reference to the Governor.

The matter of confirmation of a member of Assam Judicial Service came up for consideration before a Division Bench of Assam and Nagaland High Court in *Satyendra Nath Sen* v. *State of Assam*

(9), wherein the following observations (p. 429) of the report of S. K. Dutta, J., on the point are worthy of note:—

> "This is only reasonable that the High Court should be the confirming authority in the case of a judicial officer. The object of the various provisions in Part VI, Chapter VI of the Constitution is to put a member of the Judicial Service under the complete control of the High Court after his appointment. It is the High Court which supervises the work of a judicial officer and, therefore, it is the best judge as to whether a particular judicial officer should be confirmed or not.
>
> It is, however, argued that confirmation is part of an appointment, that is to say that an appointment is completed only when the incumbent is confirmed in the post. Hence, the appointing authority is also the confirming authority. The answer given to this proposition is that on the same reasoning, promotion is also not completed till confirmation and the promoting authority should be the confirming authority. It is in this view of the matter that the High Court has hitherto confirmed the officers promoted by it. But I do not think that there is any justification to hold confirmation is part of an appointment or promotion. As pointed out by the Supreme Court in *P. C. Wadhwa* v. *The Union of India* (10), the term 'appointment' always connotes initial appointment. .....
>
> .....
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> In *P. L. Dhingra's case* (23), the Supreme Court held that even in the case of a probationer, if termination of service was sought to be founded on misconduct, negligence, inefficiency or other disqualification, Article 311 of the Constitution would apply. Therefore, it follows that it is not correct to say that an appointment is not complete till confirmation of a probationer. Had the appointment remained in an inchoate state during the period of probation, the removal of a probationer would not have amounted to 'removal' so as to attract Article 311 of the Constitution, which enjoins that no person holding a civil post under the State or Union can be removed from his service until he has been given a reasonable opportunity to show cause against the proposed action. In the above

view of the matter, confirmation is not a part of appointment. An appointment is complete as soon as it is made and the subsequent confirmation depends on satisfactory work of the probationer. For some specific fault of the petitioner the High Court may withhold confirmation for a particular period. It may go on extending this period if the work of the officer is not satisfactory. Ultimately, if it decides that he should be removed from service for unsatisfactory work or negligence or some other fault, the High Court may draw up proceedings and then move the Government for his removal if it is not satisfied with the explanation of the officer. If the High Court decides to demote a promoted officer instead of removing him, the High Court itself is competent to do so. The Government is neither competent to make any enquiry nor to withhold confirmation. It is the High Court which is the confirming authority of a member of the Judicial Service and this power vests in the High Court under Article 235 of the Constitution."

I am in respectful agreement with these observations of the learned Judge except that confirmation is not part of promotion. I have already held that confirmation can reasonably be considered to lie in the ambit of promotion. An appeal from this judgment was taken to the Supreme Court and the reported decision is *The State of Assam and another* v. *S. N. Sen and another* (8). The rule which came up for adjudication was rule 5(iv) of the Assam Judicial Service (Junior) Rules, 1954, which was as under :—

"5. Appointment, probation and confirmation—(iv) When a person is appointed to a permanent post, he will be confirmed in his appointment at the end of the period of probation or extended period of probation. In case of the Deputy Registrar and Assistant Registrar of the High Court confirmation shall be made by the High Court. In other cases it will be made by the Governor in consultation with the High Court."

Since strong reliance has been placed by the learned Advocate-General on this decision which the learned counsel for the petitioner and respondent 3 have tried to distinguish, it is necessary to state the facts of that case. Shri Satyendra Nath Sen was appointed as Munsiff by the Governor of Assam, with effect from January 1,

1955. He was confirmed in the post of Munsiff in Assam Judicial Service (Junior) Grade II with effect from December 8, 1956. On December 15, 1961, he was promoted by the High Court to act as the Additional Sub-Judge, Cachar, which was a post in the Assam Judicial Service (Junior) Grade I and was confirmed in his post by the High Court with effect from March 1, 1964. According to rule 5(iv) *ibid*, his confirming authority was the Governor. The Accountant-General raised an objection that Shri Sen's order of confirmation should have been issued by the Governor in consultation with the High Court and not by the High Court. Since that was not done, the order issued by the High Court was not in order and could not be accepted in audit. Shri Sen, therefore, filed a petition under Article 226 of the Constitution and in the counter-affidavit to his petition filed on behalf of the State Government, not only the validity of the confirmation by the High Court was challenged but even the order of the High Court promoting him to act as the Additional Subordinate Judge, Cachar, was callenged. It was held by the High Court that under Article 235 of the Constitution the power of promoting persons belonging to the Judicial Service of a State and holding any post inferior to the post of District Judge vests in the High Court and, therefore, the promotion of Shri Sen, made by the High Court could not be challenged. In the counter-affidavit filed on behalf of the State, reliance was placed on rule 7 in Appendix II of the Assam Judicial Service (Junior) Rules, 1954, under which it was claimed that the power of promotion Grade II Officers to Grade I vested in the Governor. This submission was not accepted in view of the provisons of Article 235 of the Constitution and in spite of the rule, the power of promotion was held to be in the High Court. Dealing with this situation, Mehrotra C.J., of the High Court, observed as follows :—

> "It will be anomalous to hold that power of promotion and posting vests in the High Court while the power of confirming an officer in the post vests in the Government. With regard to the Scheme of the Constitution and the Rules, it is clear that Rule 5(iv) applies to the persons who are appointed by direct recruitment to the post of sub-judge and not to the persons who have been promoted. In my opinion, therefore, the power to confirm the judicial officers who have been promoted vests in the High Court."

The learned Chief Justice also held that rule 5(iv) was in conflict with the constitutional provisions and, therefore, it was void and must be struck down. In the appeal decided by the Supreme Court, their Lordships observed :—

> "Under the provisions of the Constitution itself the power of promotion of persons holding posts inferior to that of the District Judge is in the High Court. It stands to reason that the power to confirm such promotions should also be in the High Court."

A little later, their Lordships said :

> "The result is that we hold that the power of promotion of persons holding posts inferior to that of the District Judge being in the High Court, the power to confirm such promotion is also in the High Court. We also hold that insofar as rule 5(iv) is in conflict with Article 235 of the Constitution, it must be held to be invalid."

The learned Advocate-General has greatly relied on these observations of their Lordships, but in my view they were made in the context of Article 235 of the Constitution and it was held that the power of promotion and confirmation of members of the Judicial Service must vest in the High Court. These observations cannot be used for the argument that where the appointing authority is the Governor, the confirming authority necessarily has to be the Governor in respect of District Judges. That case was not before their Lordships and in view of the other, judgments of the Supreme Court, referred to above, it has to be held that confirmation is not a part of appointment because it is made at a stage subsequent to appointment and during the course of the probationer's service. Since the Governor is only concerned at the stage of initial appointment, and the High Court with the subsequent judicial career of the person so appointed, the power of confirmation must necessarily vest in the High Court.

The learned Advocate-General has, however, vehemently urged that the appointment or initial appointment of a District/Additional District and Sessions Judge is not complete until the appointee is confirmed. Confirmation, according to him, is the last step in the process of appointment or initial appointment which begins with an appointment on probation. Likewise, promotion or initial promotion

is not complete so long as it is officiating or temporary. When the Constitution used the words 'appointment' and 'promotion' in Article 233, it included the entire process by which the person was ultimately appointed or ultimately promoted. Once 'appointment' is complete or the 'promotion' is effective as promotion, the boundaries of Article 233 are reached and the High Court steps in under Article 235, Amplifying his argument, the learned Advocate General has submitted the Article 233 (1) and Article 235 operative in different and separate fields. Article 233 deals with the subject of 'appointments' and 'promotions' of the persons to be District Judges or Additional District Judges. Rules 8, 10 and 11 of the Rules also deal with no other matter than appointments and promotions of persons to be District Judges or Additional District Judges. The integrated nature of the power of promotion is illustrated in the decision of the Supereme Court in *The State of Assam and another* v. *S. N. Sen and another* (Supra). He strongly urges that the line of reasoning, as was adopted by the Supreme Court, should be applied in the instant case and it should be held that—

> "it stands to reason that the power to confirm such appointments or promotions must also be in the same authority, namely, the Governor of the State."

I regret, I cannot accept this submission of the learned counsel. If it is accepted, it will lead to very anomalous and strange results. It will mean that in spite of initial appointment, the appointee does not become a member of the Superior Judicial Service and the High Court dose not acquire any control over his conduct and discipline and has no power even to transfer him from one place to another, which power solely vests in the High Court. It will also mean that the control partly vests in the High Court and partly in the Governor which is contrary to the observations in *Nripendra Nath Bagchi's case* (supra), according to which the High Court is the *sole* custodian of the control over the Court of the District Judge including its Presiding Officer. During the period of probation, the appointee is allowed his annual increments and enjoys all the benefits of service permissible. It cannot be said that during the period of probation he does not hold a civil post in the State and it can also not be doubted that he is initiated into the Superior Judicial Service by the Governor when he makes his appointment on probation to a cadre post therein. If appointment includes confirmation, and becomes complete or perfect only by confirmation, their Lordships would not have used the word 'initial' before appointment and 'promotion', in the cases of *Kuseswar*

Saikia (supra) *and P. C. Wadhwa* (supra). *Kuseswar Saikia's* case related to an officiating Additional District and Sessions Judge and that makes it clear that the phrase 'initial appointment' used by their Lordships means the appointment by which an appointee is made a member of the Service and that it is that stage only at which the Governor is concerned. His powers of appointment are exhausted as soon as the initial appointment or initial promotion is made. The use of the word 'initial' before 'appointment' and 'promotion' by their Lordships in *Kuseswar Saikia's case* (supra) is significant. It connotes 'initiation' into service and not a later order making it final, firm or permanent substantive. After initial appoitment, further promotions in the cadre are matters of control vesting in the High Court and all powers to deal with the Judicial Officer come to vest in the High Court. Confirmation is one such power *to deal* with the Judicial Officer appointed to the Superior Judicial Service. It cannot, therefore, be said that 'appointment' is a process which culminates with confirmation nor can the authority *to deal* with a probationer at the stage of confirmation be held to be some one other than the High Court. If any rules are framed by the Governor in exercise of his power under Article 309 of the Constitution, in respect of confirmation, the High Court alone shall have to be prescribed as the authority to decide whether to confirm or not to confirm a probationer. If the rule prescribes the Governor as the confirming authority, it will be *ultra vires* Article 235 of the Constitution. In this connection, Shri Anand Swarup, the learned Senior Advocate for respondent 3, has argued that the Governor has no power under Article 309 of the Constitution to frame rules on the subject of appointment of District Judges for which provision has been made in Article 233 wherein it has not been stated that the Governor is to make the appointment in accordance with any rules framed by him or the Legislature. It has, therefore, been submitted that appointment has to be made by the Governor at one stage only and by one order and the learned Advocate General's plea that 'appointment' constitutes a process, which begins with 'appointment on probation' and culminates with the order of confirmation, is fallacious and untenable. Support for this argument is sought from the language used in Article 234 of the Constitution whereunder appointments to the Judicial Service of a State are to be made by the Governor in accordance with the rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State. No such words are to be found in Article 233 and this difference in the language of the two Articles

clearly leads to the conclusion that no rules for appointment of District Judges can be made by the Governor under Article 309 of the Constitution and firm appointments are to be made by him right from the beginning like the appointments of Judges of the High Courts and Supreme Court and no period of probation for them can be prescribed by any rules, on the satisfactory completion of which confirmation will take place.

It has been contended by Shri J. N. Kaushal that clause (2) of Article 233 does not relate to appointment of a direct recruit but only prescribes the conditions for eligibility or qualification for being considered for appointment and that the appointment is actually made under clause (1) of Article 233 by the Governor in consultation with the High Court. At the stage of confirmation also the consultation with the High Court alone is necessary and its recommendation in the case of a direct recruit is not required. On the other hand, it has been contended by Shri Anand Swarup that if confirmation is the culmination of the process of appointment, as contended for by the learned Advocate General, it will have to be made in the same manner as the initial appointment or initial promotion, that is, on the recommendation of the High Court in the case of direct recruits and in consultation with the High Court in the case of the promotees from the Judicial Service which will create discrimination in the appraisal of their work and conduct during the period of trial in the same posts in the cadres. That surely could not have been the object of the Constitution makers. There is force in the submission of the learned counsel for respondent 3 and it leads to the conclusion that appointment of a person to be District Judge is complete when a direct recruit is initiated into the Service and thereafter his work and conduct have to be watched and scrutinised by the High Court to determine his future career in the Service.

It has been submitted by Shri Anand Swarup that confirmation is a condition of service and no condition of service can be prescribed by the Governor in exercise of his power under Article 309 of the Constitution which impinges on the control of the High Court under Article 235 of the Constitution. For this proposition, the learned counsel has relied on *Mohammad Ghouse* v. *State of Andhra*, (4) and paragraphs 12 and 13 in the judgment of the Supreme Court in *N. N. Bagchi's case* (supra). The learned counsel has also brought to our notice an unreported judgment of a Full Bench of the Orissa High Court consisting of five Hon'ble Judges including the Chief

Justice in *Registrar of the Orissa High Court* v. *Shri Baradakanta Misra and State of Orissa,* (38) in which *inter alia,* it has been held:

(1) That Article 233(1) is denuded of all contents excepting the power of appointment of District Judges, whether directly or by promotion. The Article embodies no other powers. All other powers to be exercised in respect of District Judges are in Article 235.

(2) That the decision of the Supreme Court in *Bagchi's case* (supra) has not been whittled down by the decision of that Court in the *State of Orissa* v. *Sudhansu Sekhar Misra* (5). This very decision recognises that *Bagchi's* and *Ranga Muhammad's* cases are corner-stones for the interpretation of Articles 233 and 235 of the Constitution and this fact is also clear from the later decision of the Supreme Court in *The State of Assam and another* v. *S. N. Sen and another* (8) (supra).

(3) The position of law is unassailable that disciplinary proceedings against judicial officers including District Judges can be initiated only by the High Court. The Governor has no power to initiate such a proceeding. He has no power to stay such a proceeding or to transfer the same to the Administrative Tribunal. If there is any particular rule to the contrary, it would be *ultra vires* Article 235 of the Constitution.

(4) High Court is not a Head of the Department of the Government nor is it a Government servant. Article 214 of the Constitution provides for its establishment in every State. India is a sovereign democratic republic and the sovereignty of the State does not vest in any single institution. The Executive, the Legislature and the Judiciary represent the sovereignty of the State in its three different branches. The High Court is a constitutional authority and is not subordinate to the Governor or to the Government.

(5) Conclusion is irresistible that the control vesting in the High Court under Article 235 is complete. Such control cannot be abridged by the conditions of service prescribed under Article 309 which is itself subject to Article 235.

(38) Original Cr. Misc. No. 8 of 1972 decided by Orissa High Court on 5th February, 1973.

> The conditions of service can, however, prescribe the procedure to regulate the manner of exercise of the control vested in the High Court and the power of control would be so exercised.
>
> (6) The conditions of service framed under Article 309 may or may not prescribe a right of appeal against the orders, of the High Court passed in exercise of its power under the first part of Article 235 but if such an appeal is prescribed, it must be to the High Court and not to any outside authority including the Governor, the reason being that the Governor is a constitutional Governor and if an appeal against the High Court's order is made to lie to the Governor, the same would be heard by a Minister with the opinion of a Secretary and the entire control envisaged under Article 235 would be exercised by the Executive Government, which would be wholly subversive of the independence of the Judiciary. Such a conclusion would be a complete negation of the principle established in *Bagchi's case* and the control vested in the High Court would be illusory. Doubtless, all constitutional authorities are to exercise their powers *bona fide*. But, however *bona fide* Government may act, there is bound to be honest difference of opinion. If any authority other than the High Court becomes the appellate authority, independence of the judiciary would vanish. This is not an argument of fear but an argument to reconcile Article 309 with Article 235.

These observations of the Full Bench of the Orissa High Court support the view that has been taken by me above and the observations set out at (6) above will aptly apply if the word confirmation is substituted for the word appeal.

It is conceded by the learned Advocate General that it is not an invariable rule that the appointing authority and the confirming authority must be the same. It is possible by legislation or by making rules to nominate an authority different from the appointing authority as the confirming authority. If that be the effect of the interpretation of Articles 233 and 235 of the Constitution, then it cannot be said that the appointing authority must always be the confirming authority. I have already come to the conclusion that on

the correct interpretation of Article 235 of the Constitution the power of confirmation vests in the High Court and any rule vesting this power in any other authority will be *ultra vires* Article 235.

According to the Constitution, there are three wings of the Government having equal powers and parity. However, a system of checks and balances is discernible in the scheme of the Constitution in order to ensure that none of the three organs of Government becomes so pre-dominant as to disable the others from exercising and discharging powers and functions entrusted to them. The constitution does not lay down the principles of separation of powers but it envisages such separation to a very large extent. It is desirable that the judicial wing of the Government headed by the High Court should be allowed to work in its own sphere without any obstruction by the Executive Government. In the interest of the smooth working of the judiciary, it is most appropriate that the power of confirmation of a member of the Superior Judicial Service appointed on probation must vest in the High Court. If the power of confirmation of direct recruits as well as promotees is given to the Governor, even in consultation with the High Court, along with the power to differ from the recommendation of the High Court, he may in one case impose an inefficient, corrupt or undesirable officer on the High Court against its recommendation and in another case deprive the State Judiciary of an efficient and honest officer. As has been pointed out in some of the judgments referred to earlier, the Governor has to act on the advice of his Ministers and it is not unknown that political pressures and pulls do work in these matters and many a time the decisions are not taken on merits. The result necessarily will be that the quality of the administration of justice shall be greatly affected and the work of the judiciary will suffer a set-back besides earning for it a bad name. On a deep consideration of the matter, I am of the view that the Constitution makers intended that the power of confirmation, if confirmation can be provided for by the rules, must be with the High Court alone and that if the High Court is not satisfied with the work and conduct of the probationer, it can ask the Governor to pass the orders for dispensing with his services, that is, the decision is to be of the High Court, but the order giving effect to it will be issued by the Governor. Reference for passing such an order to the Governor will only be made if provided for in the Service Rules which can, however, provide for such an order being passed by the High Court and that will be more in consonance with the provisions of Article 235 of the Constitution. It is

not necessary that every order of discharge from service should be made by the appointing authority. Article 311(2) only requires that orders of removal or dismissal are to be passed by the appointing authority because those orders are by way of punishment and not every order of discharge from service for whatever reason.

Looked at from any point of view, as discussed above, the conclusion is that the power of confirming an officer appointed to the Superior Judicial Service on probation pertains to the domain of control and promotion and vests solely in the High Court and the Governor has no say in the matter. In fact, he does not perform any function at that stage. On this conclusion, the order passed by the High Court confirming the petitioner and notified under its authority was legal and no objection can be raised thereto. The Governor thereafter had no jurisdiction to consider whether the petitioner had completed the period of his probation satisfactorily or not with a view to decide whether he should be confirmed in the Service or not. On this conclusion, rule 10 of the Rules is *ultra vires* Article 235 of the Constitution and is hereby struck down. In the light of this decision some other rules of the Superior Judicial Service shall also have to be revised and amended so as to bring them in conformity with Articles 233 and 235 of the Constitution.

If my decision on the first point discussed above is not accepted to be correct, the question arises: who is competent to certify that the work and conduct of such a probationer have or have not been satisfactory during his period of probation. Evidently, the reply is that the report has to be made by the High Court on the work and conduct of the petitioner during the period of his probation, as the probationer works under the control and supervision of the High Court which watches his work and conduct during that period. But the more important question is about the value to be attached to the report made by the High Court. The rule provides that the Governor has to make the decision in consultation with the High Court. The meaning and manner of consultation have been elaborately explained by their Lordships of the Supreme Court in *Chandramouleshwar Prasad* v. *The Patna High Court and others*, (15). The following observations of their Lordships are worthy of note:—

> "The question arises whether the action of the Government in issuing the notification of October 17, 1968, was in compliance with Article 233 of the Constitution. No doubt

the appointment of a person to be a District Judge rests with the Governor but he cannot make the appointment on his own initiative and must do so in consultation with the High Court. The underlying idea of the Article is that the Governor should make up his mind after there has been a deliberation with the High Court. The High Court is the body which is intimately familiar with the efficiency and quality of officers who are fit to be promoted as District Judges. The High Court alone knows their merits as also demerits. This does not mean that the Governor must accept whatever advice is given by the High Court but the Article does require that the Governor should obtain from the High Court its views on the merits or demerits of persons among whom the choice of promotion is to be limited. If the High Court recommends A while the Governor is of opinion that B's claim is superior to A's, it is incumbent on the Governor to consult the High Court with regard to its proposal to appoint B and not A. If the Governor is to appoint B without getting the views of the High Court about B's claim *vis-a-vis* A's to promotion, B's appointment cannot be said to be in compliance with Article 233 of the Constitution..... ..... Consultation with the High Court under Article 233 is not an empty formality. So far as promotion of officers to the cadre of District Judges is concerned, the High Court is best fitted to adjudge the claims and merits of persons to be considered for promotion. The Governor cannot discharge his function under Article 233 if he makes an appointment of a person without ascertaining the High Court's views in regard thereto. It was strenuously contended on behalf of the State of Bihar that the materials before the High Court amply demonstrate that there had been consultation with the High Court before the issue of the notification of October 17, 1968. It was said that the High Court had given the Government its views in the matter; the Government was posted with all the facts and there was consultation sufficient for the purpose of Article 233. We cannot accept this *Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views,*" (emphasis mine).

In *Ranga Muhammad's case* (supra) the Supreme Court observed in paragraph 12 of the report:—

> "Consultation loses all its meaning and becomes a mockery if what the High Court has to say is received with ill-grace or rejected out of hand."

In my opinion, it depends on the kind and nature of the case in which consultation is obtained from the High Court which determines the value of that consultation. In a case of promotion from the judicial Service to the Superior Judicial Service, there are various officers whose claims can be or are entitled to be considered and, therefore, if the Governor and the High Court are not agreeable to the promotion of one and the same officer, the scope for difference of opinion is there which has to be resolved by deliberation and discussion. But where there is no choice before the State Government or the Governor, the recommendation or the views of the High Court have to be accepted. In the case of a probationer, the Government cannot collect any material by holding an enquiry of its own, as has been held by their Lordships of the Supreme Court in *Bagchi's case* (supra). It has perforce to depend on the opinion of the High Court about the conduct and work of the probationer. Hence there is no scope for the Governor to differ from the views expressed by the High Court even if the High Court refuses to supply the material on which it has based its opinion to the Governor. What has to be considered are the views of the High Court and not the material on which they are based.

The order of the Governor declaring the petitioner to be unfit for being retained in the Superior Judicial Service and his reversion to the post of District Attorney has been challenged on various grounds. The learned counsel for the petitioner, Shri D. N. Awasthy, has submitted that even if rule 10(3) of the Rules is valid and the power of confirmation vests in the Governor, he has to exercise that power in consultation with the High Court, which by necessary implication means that there cannot be consultation with anybody else. For this proposition, the learned counsel relies on the judgment of the Supreme Court in *Chandra Mohan* v. *State of Uttar Pradesh and others* (13). The relevant observations from para 7 of the report are quoted below:—

> "We are assuming for the purpose of these appeals that the 'Governor' under Article 233 shall act on the advice of the

Ministers. So, the expression 'Governor' used in the judgment means Governor acting on the advice of the Ministers. The constitutional mandate is clear. The exercise of the power of appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of district Judge in consultation with the High Court. The object of consultation is apparent. The High Court is expected to know better than the Governor in regard to the suitability or otherwise of a person, belonging either to the 'judicial service' or to the Bar, to be appointed as a district judge. Therefore, a duty is enjoined on the Governor to make appointment in consultation with a body which is the appropriate authority to give advice to him. This mandate can be disobeyed by the Governor in two ways, namely, (i) by not consulting the High Court at all, and (ii) by consulting the High Court and also other persons. In one case he directly infringes the mandate of the constitution and in the other he indirectly does so, for his mind may be influenced by other persons not entitled to advise him. That this constitutional mandate has both a negative and positive significance is made clear by the other provisions of the Constitution. Whereever, the Constitution intended to provide more than one consultant, it has said so: see Article 124(2) and 217(1), wherever the Constitution provided for constitution of a single body or individual, it said so: see Article 222. Article 124(2) goes further and makes a distinction between persons who shall be consulted and persons who may be consulted. These provisions indicate that the duty to consult is so integrated with the exercise of the power that the power can be exercised only in consultation with the person or persons designated therein. To state it differently, if A is empowered to appoint B in consultation with C, he will not be exercising the power in the manner prescribed if he appoints B in consultation with C and D."

These observations clearly help the learned counsel because in this case the State Government entertained the complaints of Shri Mangat Rai dated August 2, 1972, and April 23, 1973, and the complaint of Shri Gur Parshad, District Attorney, Karnal, and

directed the Inspector General of Police and Director, Special Enquiry Agency, Kanwar Randip Singh, to make a confidential inquiry into the matter in spite of the fact that an enquiry into those very charges had been made by the High Court and the petitioner exonerated. The result of the inquiry and the decision of the High Court exonerating the petitioner were communicated to the State Government by the Registrar of the High Court in his D.O. letters dated April 10, 1973, and May 4, 1973. It was expressly stated that the charges had remained unsubstantiated and that Hon'ble the Chief Justice and Judges of the High Court were of the opinion that the petitioner had satisfactorily completed his period of probation and that he deserved confirmation. Since the power of confirmation vested in the High Court, it proceeded to confirm the petitioner. Thereafter, there was no justification for the State Government to hold an enquiry into those very allegations and charges through its own nominee, Kanwar Randip Singh, Inspector General of Police and Director, Special Enquiry Agency, and to act upon it. The only justification pleaded is that the High Court, in spite of persistent demand by the Government, refused to supply a copy of the report of Mr. Justice Gurnam Singh to the Government even confidentially for the perusal of the Governor. I am of the opinion that the Government or the Governor was only concerned with the result of the enquiry, which had been duly communicated to the State Government. It was not necessary for it to look into the report of the Enquiry Officer to find out whether the conclusions arrived at by him, which were accepted by the High Court in a meeting of the Hon'ble the Chief Justice and the Judges, were justified or not.

The State Government or the Governor has not been constituted as an appellate authority to comment upon or to differ from the conclusions of the High Court in respect of the proof or non-proof of the allegations and charges enquired into by an Hon'ble Judge appointed by the High Court for this purpose. It has been held by their Lordships of the Supreme Court in the *State of West Bengal and another* v. *Nripendra Nath Bagchi* (2) (supra):—

> "..... the control which is vested in the High Court is a complete control subject only to the power of the Governor in the matter of appointment (including dismissal and removal) and posting and promotion of District Judges. Within the exercise of the control vested in the

High Court, the High Court can hold enquiries impose punishments other than dismissal or removal, subject however, to the conditions of service, and a right of appeal if granted by the conditions of service, and to the giving of an opportunity of showing cause as required by clause (2) of Article 311 unless such opportunity is dispensed with by the Governor acting under the provisos (b) and (c) to that clause. The High Court *alone* could have held the enquiry in this case. To hold otherwise will be to reverse the policy which has moved determinedly in this direction."

It is thus apparent that the order of the State Government for holding the confidential enquiry through Kanwar Randip Singh was wholly unauthorised and was not made in good faith. There is no statutory provision on the basis of which this order can be sustained. It is recognised canon of our jurisprudence that the Executive has to justify all its actions on the basis of some law or a provision having the force of law. The opinion of the High Court which was conveyed to the State Government in its letters dated April 10, 1973, and May 4, 1973, was received with ill-grace and rejected out of hand instead of giving it the due weight, coming as it did from the authority who alone knew the merits and demerits of the petitioner. The Governor in his order has referred to those two letters and has characterised that the opinion of the High Court was conveyed in an indirect manner. Be that as it may, the firm opinion of the High Court was before the State Government that the petitioner had been exonerated of all the charges levelled against him, his work and conduct during the period of probation were satisfactory and that he deserved to be confirmed. It was further pointed out that as the power of confirmation lay with the High Court, the High Court had passed the order of confirmation. Thereafter, no enquiry could be ordered by the State Government without reference to the High Court. While ordering inquiry through Kanwar Randip Singh, the law laid down by their Lordships of the Supreme Court in *Bagchi's case* (supra), was conveniently forgotten. It is quite apparant that on the basis of the opinion of the High Court the only order that could be passed was of confirmation and that the procedure for holding an unauthorised enquiry through Kanwar Randip Singh was resorted to with a view to facilitate the passing of the impugned order, that is, of ousting the petitioner from his judicial service. I have been driven to this

conclusion because of the following facts alleged by the petitioner and not denied by respondents 1 and 2, which are deemed to have been admitted according to the principles of pleadings embodied in rules 3, 4 and 5 of Order VIII of the Code of Civil Procedure:—

(1) Shri Rishi Parkash was Officiating Sub Inspector of Police against whom the petitioner had passed severe strictures in the cases of State v. Ram Piara and his sons and there was thus no love lost between the two. He pitched his tent outside the residence of the petitioner when Gurnam Singh, J., went to make the inquiry with a view to overawe the petitioner and keep an eye on his visitors. He was transferred to Ambala almost at the same time when the petitioner was transferred and was approved for promotion as Officiating Inspector of Police by the Inspector General of Police by order dated March 2, 1973, and a direction was issued to give effect to that order. Thereafter, by order dated April 24, 1973, he was transferred from C.I.D. Ambala to C.I.D. Karnal about the time when Kanwar Randip Singh was entrusted with the confidential enquiry. It is evident that the motive of the transfer was to collect the material for that inquiry.

(2) The complainant, Mangat Rai of Karnal, was not a litigant and had no case of his own in the Court of the petitioner. Gur Parshad, District Attorney, Karnal, did not make any complaint to the High Court about preparation of inaccurate record of evidence by the petitioner but mentioned this matter in his communication dated June 12, 1972, to the Legal Remembrancer. The District Attorney never brought this matter to the notice of the High Court on the administrative side and no litigant ever complained about it on the judicial side in various appeals filed against the orders of the petitioner.

(3) Kanwar Randip Singh first made a report exonerating the petitioner and he was directed to go again to Karnal for making a further enquiry. He then submitted a report indicating the petitioner. The submission of the first report by Kanwar Randip Singh has not been denied and about further inquiry it has been stated that he was at liberty to go to Karnal for the purposes of inquiry as

many times as he felt necessary. It has not been denied that he was directed to make further inquiry.

The two reports submitted by Kanwar Randip Singh have not been filed in this case and it is not known whether he examined any judicial files in order to find whether any records had been incorrectly prepared. Neither in the letter dated June 1, 1973, nor in the order of the Governor nor in the written statement filed by the State of Haryana reference of any judicial record has been made. From the order of the Governor it appears that some lawyers made statements to this effect on the basis of which Kanwar Randip Singh came to the conclusion that the petitioner had prepared inaccurate records. The allegation was too vague and was not supported by any judicial records and still it was readily believed which points clearly to the fact that the State Government and its officers were too ready and willing to accept any allegation, however vague, against the petitioner. Although the State Government has filed a copy of the detailed order of the Governor dated June 21, 1973, it has not filed the copies of the reports of Kanwar Randip Singh and it is not clear from the order of the Governor whether the earlier report of Kanwar Randip Singh exonerating the petitioner was brought to his notice. It is also clear that Rishi Parkash was specially deputed to collect the material against the petitioner and in the true traditions of the Police Department he was rewarded by promotion in spite of severe strictures passed against him by the petitioner in some judicial cases. I am, therefore, of the opinion that the inquiry was also not held impartially or in good faith. The impugned order is, therefore, bad in law inasmuch as it is based on extraneous material which could not be taken into consideration by the Governor. The Governor had to act on the report of the High Court that the petitioner had been exonerated of all the charges and the allegations levelled against him and that his work and conduct during the probation were satisfactory and he deserved to be confirmed.

The helplessness and frustration felt by the State Government because of the refusal of the High Court to supply a copy of Mr. Justice Gurnam Singh's report did not clothe it with the power of holding an enquiry through its own agency. That enquiry had to be held only by the High Court or under its orders. The Executive Government is an equal partner with the High Court in the administration of the State. If each wing is to be allowed to work

in its own sphere without interference by the other wing, there was no occasion for the Government to feel helpless or frustrated. Supposing Shri Mangat Rai and the District Attorney had made their complaints after the petitioner had been confirmed, they would have been enquired into only by the High Court and if, as a result of that enquiry, it came to the conclusion that the charges and allegations had not been substantiated, it would have filed the papers and taken no further action. In that case, the Government might have been informed that no further action was necessary. The Government then would not have been able to insist that it must hold an enquiry through its own agency because it was not satisfied with the decision of the High Court. No further action could have been taken by the State Government or the Governor. If the Government had to rest content in that case, it should have done so in the instant case also by accepting the report of the High Court. In this view of the matter, I am clearly of the opinion that the enquiry held by Kanwar Randip Singh was unauthorised and the action taken by the Council of Ministers and the Governor on the basis thereof was also unauthorised and without jurisdiction. That order has to be quashed on this ground.

Another legal infirmity in the order of the Governor is that neither the State Government nor the Governor, before passing that order, gave a notice to the petitioner under rule 9 of the Punjab Civil Services (Punishment and Appeal) Rules, 1952 (hereinafter called the Punishment and Appeal Rules), which are still in force in the State of Haryana. That rule reads as under:—

> "Where it is proposed to terminate the employment of a probationer, whether during or at the end of the period of probation, for any specific fault or on account of the unsatisfactory record or unfavourable reports implying the unsuitability for the service, the probationer shall be apprised of the grounds of such proposal, and given an opportunity to show cause against it, before orders are passed by the authority competent to terminate the appointment."

It is maintained on behalf of the State Government that in view of the language of rule 10(3) of the Rules, the provisions of rule 9 of the Punishment and Appeal Rules did not apply and there was no necessity of issuing a show-cause notice to the petitioner. It is

further submitted that rule 17 of the Rules makes the provisions of the Punishment and Appeal Rules applicable to the members of the Service only in matters relating to discipline, penalties and appeals and since the case of the petitioner is not covered by that rule, he was not entitled to a notice. The stand taken by the State Government on this point is misconceived. Rule 10(3) only gives the power to the Governor not to confirm the petitioner after having consultation with the High Court and such an order can be passed without giving any reason. But it does not provide "without giving any notice to the probationer". Thus, the requirement of giving notice to the petitioner to show cause against the deficiencies found in his work and conduct, which made him unsuitable to be continued in service, under rule 9 of the Punishment and Appeal Rules, has not been dispensed with or ruled out. It is an established principle of interpretation of statutes that if there are two provisions concerning the same subject in a statute, they have to be interpreted in a manner and with the view to harmoniously reconcile them because the Legislature, busy as it is, does not enact useless provisions. If harmonious construction of rules 10(3) and 17 of the Rules is made, then it follows that rule 10(3) gives the power to the Governor while rule 9 of the Punishment and Appeal Rules made applicable by rule 17 *ibid,* prescribes the procedure for the exercise of that power. In the case in hand, the power was not exercised in the manner provided for its exercise in the statutory rule 9 *ibid.* Rule 3 of the Punishment and Appeal Rules provides that the said rules are in addition to and not in derogation of the rules framed by the Governor under Article 309 of the Constitution of India in which category the Superior Judicial Service Rules fall. The powers, rights and remedies provided in the Punishment and Appeal Rules have been expressly saved which clearly means that the petitioner could not have been deprived of his right to receive notice and tender explanation provided for in rule 9 *ibid.* Even Kanwar Randip Singh did not ask for his explanation and made an *ex parte* report on which action was taken by the Council of Ministers and the Governor behind the back of the petitioner without apprising him of the findings against him. Thus, the only safeguard provided for the petitioner in a statutory rule was lost and the impugned order, therefore, cannot be sustained.

Even if rule 9 of the Punishment and Appeal Rules did not apply on the ground that the proceedings were administrative and not disciplinary in character, the well-known rule of natural justice

audi alteram partem required that the petitioner must be given a notice to explain what had been found against him and which had made him unsuitable for being retained in the Superior Judicial Service of the State. It has been held by their Lordships of the Supreme Court in the *State of Orissa* v. *Dr. (Miss) Binapani Dei and others,* (39):—

> "It is true that the order is administrative in character but even an administrative order which involves civil consequences, as already stated, must be made consistently with the rules of natural justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting or explaining the evidence. No such steps were admittedly taken, the High Court was, in our judgment, right in setting aside the order of the State."

In that case, an enquiry was held by the State Government with regard to the age of the first respondent, Dr. (Miss) Binapani Dei, at her back and without notice to her and it was held that :

> "such an enquiry and decision were contrary to the basic concept of justice and cannot have any value."

The enquiry to ascertain whether the appointee on probation deserves to be continued in service or not is, in my opinion, quasi-judicial in nature in accordance with the ratio of the decision of their Lordships of the Supreme Court in *A. K. Kraipak and others* v. *Union of India and others,* (40). The pertinent observations are contained in paragraphs 13 and 14 of the report which are reproduced below:—

> "The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power, one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that

(39) A.I.R. 1967 S.C. 1269.

(40) A.I.R. 1970 S.C. 150.

power is expected to be exercised. In a welfare State like ours it is inevitable that the organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its validity if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power.....

.....

..... This Court in *Purtabpore Co. Ltd.* v. *Cane Commissioner of Bihar,* (41), held that the power to alter the area reserved under the Sugar-Cane (Control) Order, 1966, is a quasi-judicial power. With the increase of the power of the administrative bodies it has become necessary to provide guidelines for the just exercise of their power. To prevent the abuse of that power and to see that it does not become a new despotism, Courts are gradually evolving the principles to be observed while exercising such powers. In matters like these public good is not advanced by a rigid adherence to precedents. New problems call for new solutions. It is neither possible nor desirable to fix the limits of a quasi-judicial power."

Even if the impugned order of the Governor is considered to be administrative, it had to be passed after affording an opportunity to the petitioner to explain his conduct or whatever had been found against him, since the effect of the order was to remove him from the Superior Judicial Service and thus put an end to his judicial career. In *A. K. Kraipak's case* (40) (supra), further observations

(41) C.A. No. 1464 of 1968 decided by Supreme Court on 21st November, 1968.

of their Lordships in paragraph 20 of the report are also significant on this point. Their Lordships said:—

> "The aim of the rules of natural justice is to secure justice or, to put it negatively, to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. In the past is was thought that it included just two rules, namely (1) no one shall be a judge in his own cause (*Nemo debet esse judex propria causa*), and (2) no decision shall be given against a party without affording him a reasonable hearing (*audio alteram pertem*). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently, it was the opinion of the Courts that unless the authority concerned was required by the law under which it functioned to act judicially, there was no room for the application of the rules of natural justice. The validity of that limitation is not questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice, one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far-reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in *Suresh Koshy George* v. *University of Kerala*, (42) the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to great extent on the facts and circumstances of that case, the frame-work of the law under which the enquiry

(42) A.I.R. 1969 S.C. 198.

is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a Court that some principle of natural justice had been contravened, the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case."

There is nothing in rule 10(3) of the Rules to prohibit the principles of natural justice, which are part of the law wherein the rule of law ranges supreme, from being applicable when the civil right of the subject to continue in service is affected by the order that is likely to be passed to his prejudice. It appears to me that the rule was conveniently given a go-by in order to pass the order to oust the petitioner from the Superior Judicial Service.

The learned counsel for the petitioner has referred to the decision of the Supreme Court in *Ranendra Chandra Banerjee* v. *The Union of India and another*, (26). The appellant in that case was appointed on probation for one year and the letter of appointment said that during the said period his service might be terminated without any notice and without any cause being assigned. He accepted the offer on this condition and joined the service on June 4, 1949. His period of probation expired on June 3, 1950, but it was extended from time to time. On July 4, 1952, the appellant was informed that his probation period could not be extended and was called upon to show cause why his services should not be terminated. The appellant showed cause but he was informed that his explanation was not satisfactory and that his services were being terminated after August 31, 1952. He filed a petition under Article 226 of the Constitution in the High Court and his main contention was that he was entitled to the protection of Article 311(2) of the Constitution of India and as this was not afforded to him, the order terminating his services was illegal. It was also urged on his behalf that he was governed by rules 49 and 55-B of the Civil Services Classification, Control and Appeal) Rules, 1930, and was entitled to the protection of those rules. As his services had been terminated without compliance of those rules, he was in any case entitled to reinstatement. The High Court held that the appellant was not entitled to the protection of Article 311(2) of the Constitution, rules 49 and 55-B *ibid* did not apply to him and he was governed by the contract of his service which provided that his services might be

terminated without any notice and without any cause being assigned during the period of probation. The High Court further held that rules 49 and 55-B would not, in any case, apply to the appellant in the face of the contract under which he was appointed in view of rule 3(a) of the Rules. The petition was consequently dismissed. In appeal, the Supreme Court held that in spite of the contract contained in the letter of appointment, rule 55-B applied and was not excluded by rule 3(a). A rule corresponding to rule 3(a) of the Civil Services (Classification, Control and Appeal) Rules, 1930, is rule 1(2) of the Punishment and Appeal Rules and it cannot, therefore, be said that because of the provisions of rule 10(3) of the Superior Judicial Service Rules, the applicability of rule 9 of the Punishment and Appeal Rules was excluded. Moreover, Rule 3 of the Punishment and Appeal Rules prescribes that these rules are in addition to and not in derogation of the provisions of such rules as may be made by the Governor in the exercise of the powers conferred by proviso to Article 309 of the Constitution of India to regulate the recruitment and conditions of service of persons appointed to different services and posts in connection with the affairs of the State of Punjab. Rule 10(3) of the Rules was made in exercise of that power by the Governor and this rule does not prescribe the procedure for taking action against a probationer. That procedure has been prescribed in rule 9 of the Punishment and Appeal Rules, as I have said above. Its applicability has not been expressly or by necessary implication excluded nor can it be said that the rule of natural justice *audi alteram partem* is inconsistent with the statutory rule 10(3) of the Rules and so could not be followed. In the case of *Ranendra Chandra Banerjee* (supra), rule 55-B was in identical terms as rule 9 of the Punishment and Appeal Rules and their Lordships observed :—

> "..... in a case covered by Rule 55-B all that is required is that the defects noticed in the work which make a probationer unsuitable for retention in the service should be pointed out to him and he should be given an opportunity to show cause against the notice, enabling him to give an explanation as to the faults pointed out to him and show any reason why the proposal to terminate his services because of his unsuitability should not be given effect to. If such an opportunity is given to a probationer and his explanation in reply thereto is given due consideration, there is, in our opinion, sufficient compliance

with rule 55-B. Generally speaking the purpose of a notice under rule 55-B is to ascertain, after considering the explanation which a probationer may give, whether he should be retained or not and in such a case it would be sufficient compliance with that rule if the grounds on which the probationer is considered unsuitable for retention are communicated to him and any explanation given by him with respect to those grounds is duly considered before an order is passed. This is what was done in the present case and it cannot, therefore, be said that the appellant was not given the opportunity envisaged by rule 55-B."

In the case in hand, the State Government or the Governor admittedly did not comply with the procedure prescribed in rule 9 of the Punishment and Appeal Rules and in the absence of that compliance, the impugned order, according to this judgment of the Supreme Court, cannot be sustained.

In *Ram Saran Dass,* v. *State of Punjab* (43), the petitioner was recruited to the Punjab Civil Service (Executive Branch) and was appointed as a Revenue Assistant in the Department of Agrarian Reforms. He completed his probation period of three years on May 16, 1960, That period was not extended and during the probationery period he completed training in all respects and secured four increments. His services were treminated on August 3, 1962, under rule 23 of the Punjab Civil Services (Executive Branch) Rules, 1930, which reads as under:—

"23. Any officer appointed to the Service may during the period of his probation be removed from the Service under the orders of the Governor of Punjab; or if he was appointed from Register A-I or A-II, may be reverted to his former appointment if in the opinion of the Governor of Punjab his work or conduct is unsatisfactory."

This rule is in indentical terms as rule 10(3) of the Rules. Apart from the plea of *mala fides* taken by the petitioner in that case, he had submitted that the rules applicable to probationers on the point of termination of their services had not been complied with and this breach by itself vitiated the impugned order. In that connection,

(43) 1965 P.L.R. (Supp.) 586.

reference was made to rule 9 of the Punishment and Appeal Rules. It was submitted on behalf of the State that the petitioner was officiating and not holding a substantive post and was, therefore, not a probationer to whom rule 9 of the Punishment and Appeal Rules applied. Speaking for the Bench, Dua, J., said in paragraph 10 of the report:—

> "The question whether the petitioner in the present case is a probationer within the contemplation of rule 9 of the Punishment and Appeal Rules and thus entitled to an opportunity to show cause against the termination of his employment or whether he can be removed from service without assigning any reason under rule 23 of the Executive Branch Rules, is not free from difficulty, but on considering the various aspects canvassed at the Bar, as discussed above, I am inclined, as at present advised, to take the view, that the petitioner is a probationer entitled to an opportunity to show cause against the termination of his employment and he cannot be removed from service by resorting to rule 23 read with rules 21, 22 and 24 of the Executive Branch Rules without affording him such an opportunity. On the facts and circumstances of this case, rule 23 does not seem to be available to the respondent. It cannot be denied that action against the petitioner has been prompted and is being taken as a result of unsatisfactory record or unfavourable reports, if not also for specific faults. Opportunity to show cause would in the circumstances seem to be necessary."

The petition was accepted on the ground that the petitioner was entitled to an opportunity to show cause against the termination of his employment and, in the absence of such notice, his removal was vitiated and, therefore, was quashed and set aside.

In *State of Punjab* v. *Shamsher Singh* (44), a Division Bench of this Court held that the probationer is entitled to a show-cause notice under rule 9 of the Punishment and Appeal Rules when it is proposed to terminate his employment, whether during or at the end of the period of probation, for any specific fault or on account of the unsatisfactory record or unfavourable reports implying the unsuitability for the service and that he should be apprised of the grounds of such proposal and given an opportunity to show cause against it, before

(44) 1970 P.L.R. 841.

orders are passed by the authority competent to terminate the appointment. In that case, the petitioner was a member of the Punjab Civil Service (Judicial Branch). It was observed that the work and conduct of the probationer were watched during the period of his probation by the High Court which came to the conclusion that he was not suitable to be retained in the service. For the purposes of rule 9, a show cause notice was issued to him and his explanation was considered by the High Court before a recommendation was made to the State Government for terminating his service. It was further held that such termination of service did not imply any stigma nor did it amount to dismissal or removal from service attracting the provisons of Article 311(2) of the Constitution. In this state of the law, I do not feel any necessity of referring to other judicial decisions because the proposition of law seems to be well settled that where rule 9 of the Punishment and appeal Rules applies, a show-cause notice has to be issued to the probationer before terminating his service. Even if in a rule concerning the probationer such a provision of issuing show-cause notice is not made, it will be necessary to comply with the rule of natural justice *audi alteram partem* and a show-cause notice shall have to be issued to the probationer before an order terminating his services is passed.

The learned Advocate-General has argued that the petitioner was not a probationer, but was on probation. In the written statement filed by respondent 1, it is clearly admitted that the petitioner was a probationer and it is nowhere pleaded that he was on probation and not a probationer. In any case, I do not find any substance in the submission of the learned counsel. 'Probationer' has been defined in rule 2.49 of the Punjab Civil Services Rules, Volume I, Part I, according to which a Government servant employed on probation in or against a substantive vacancy in the cadre of a department is a probationer. The petitioner satisfies all these conditions, that is, he was appointed against a substantive vacancy in the cadre of Superior Judicial Service and on probation of two years with the specific condition that if his work and conduct during that period were found to be satisfactory, he would be confirmed, otherwise his services would be dispensed with. The learned counsel has sought to argue that before the petitioner was appointed to the Superior Judicial Service, he was a confirmed District Attorney in the service of the Haryana State and, therefore, he can be described only as on probation and not a probationer, in view of the notes below rule 2.49. Rule 9 of the Rules relates to the appointment of direct recruits and the petitioner

was admittedly recruited under that rule. In his order of appointment it was nowhere stated that his lien on his substantive post of District Attorney had been retained. Rule 10(3), under which action has been taken, provides that in case the work and conduct of a direct recruit are not found to be satisfactory by the Governor, in consultation with the High Court, his services will be dispensed with. This rule does not, therefore, apply to direct recruits to the Superior Judicial Service appointed on probation, who were in some service of the State prior to their appointment because there is no provision for reverting such officers to their substantive posts in case their work and conduct during the probation period were found to be not satisfactory. The petitioner, for all intents and purposes, had to be considered as a member of the Bar and not as a person in the permanent employment of the Government. The petitioner was thus a probationer and not on probation. Even if he is considered to be an officer on probation and not a probationer, the rule of natural justice *audi alteram partem* had to be observed in view of the discussion held above, particularly because after obtaining his explanation the petitioner had been exonerated of the same charges by an Hon'ble Judge of this Court whose findings had been accepted by the full Court on its administrative side. The Government must have been aware of the fact that the enquiring Judge had called for the explanation of the petitioner with regard to the charges and allegations levelled against him and evidently found substance in those explanations and for that reason exonerated him. In these circumstances, it was incumbent on the State Government to have called for the explanation of the petitioner in case action was desired to be taken against him on the ground that the charges levelled against him had been established and proved. On these facts, I am led to the irresistible conclusion that the omission to give notice to the petitioner calling for his explanation was deliberate and the object was to remove him from the Superior Judicial Service and thus precipitate conflict or confrontation with the High Court. The impugned order is, therefore, liable to be quashed on this ground.

Much capital has been made by the Government of the fact that on July 7, 1973, the petitioner would have completed his maximum period of probation, that is, three years and if no order refusing confirmation had been passed prior to that date, he would have become automatically confirmed which result the Government could not allow to happen. I, however, find no substance in this plea. The report of the Enquiry Officer, Kanwar Randip Singh, had been submitted to

the Government before June 1, 1973, and the Government had made up its mind as to what charges or defects making the petitioner unsuitable for further continuance in service had been proved as is clear from the demi-official letter written by the Deputy Secretary to Government, Haryana, Political and General Services Department, to the Registrar of the High Court, a copy of which is annexure R. 1/14, wherein it has been categorically stated that—

(1) In the enquiry it has been proved *inter alia* that Shri N. S. Rao does not prepare correct judicial record. Preparation of correct judicial record is the foundation on which proper judicial decisions are rendered and surely, no Judicial Officer is expected to prepare an incorrect record. If any officer prepares incorrect record, he cannot obviously be considered to be a proper Judicial Officer.

(2) It has also been found that in the private complaint filed by Shri Ram Piara, agaist Shri R. C. Sharma, I.P.S., formerly Superintendent of Police, Karnal, under section 500 I.P.C., which was pending in the Court of Shri T. P. Garg, Judicial Magistrate, Karnal, Shri N. S. Rao, passed orders on the application of Shri Ram Piara instructing the Magistrate to adjourn the case from May 15, 1972, to some other date. This is clearly an irregularity and an act of mis-conduct on the part of Shri N. S. Rao. Shri Rao had no legal authority to issue any direction to a Subordinate Magistrate in a case which was not pending before him (Shri Rao).

(3) A very serious charge has been clearly established from the record of the Civil Suit entitled *Raghbir Singh* v. *Shakuntala Devi and others* and the appeal arising therefrom which proves that Shri N. S. Rao, showed favour to one U.S. Dalal. Then the facts of that case have been stated and a conclusion is reached that 'this exhibits highly improper conduct and lack of judicial integrity on the part of Shri Rao.'

It was then stated that "the above charges against Shri Rao are of such serious nature that the obvious inference would be that the work and conduct of Shri Rao, during probation period has been unsatisfactory." These so-called proved charges could be stated to the petitioner in a show-cause notice which would be issued on June 1, 1973, or a

day or two later giving him two or three weeks' time for reply. The maximum period of probation was to expire on July 7, 1973, and still there were 37 days left. Moreover, the State Government was under a wrong impression that on the expiry of the period of three years, the petitioner would become automatically confirmed if no order was passed by the competent authority. This impression was based on the judgment of the Supreme Court in *The State of Punjab* v. *Dharam Singh* (14), but was completely wrong. There is nothing called automatic confirmation. In *Dharam Sngh's case* (supra) all that the Supreme Court said was that if after the expiry of the maximum period of probation no order of confirmation or discharge from service is passed by the competent authority and the employee is allowed to remain in service for a number of years, during which he earns increments, etc., the presumption would be that he had been confirmed. I am of the opinion that where the competent authority issues notice to the probationer before or soon after the expiry of the period of probation, the intention is made clear that the matter of confirmation is under consideration and unless an order is passed, the probationer cannot claim automatic confirmation. This matter was considered by me in *Shri Ishwar Chander Aggarwal* v. *The State of Punjab* (16), and the relevant observations are as under:—

> "The first point argued by the learned counsel for the petitioner is that after the expiry of the maximum period (three years) of probation on November 11, 1968, the petitioner ceased to be a probationer and became entitled to be confirmed in the Service and no action against him could be taken under rule 9 of the Appeal Rules thereafter. According to the petitioner, he was entitled to be confirmed when a permanent vacancy occurred on September 17, 1969, in which he could and should be deemed to have been confirmed and, therefore, the order of his discharge from service made on December 15, 1969, was bad in law. Reliance for this submission is placed on the judgment of their Lordships of the Supreme Court in *State of Punjab* v. *Dharam Singh* (supra). I regret that I cannot agree to this submission. The action under rule 7(2) and (3) in Part D of the Service Rules read with rule 9 of the Appeal Rules can be taken during the period of probation as well as after the expiry of the period of probation, which necessarily implies that the appointing authority has to be given some reasonable time to decide whether the work and conduct

of the probationer were satisfactory during the period of his service so as to entitle him to be confirmed, or, whether his work and conduct were so unsatisfactory that it was desirable to dispense with his services, and it cannot be said that immediately on the expiry of the maximum period of probation, the petitioner is to be deemed to have been confirmed. That result could have followed only if, before the expiry of the period of probation or within a reasonable time thereafter, no action had been taken by the appointing authority to dispense with his services. Where proceedings are initiated before the expiry of the period of probation or within a reasonable time of the expiry thereof, the decision, whether to dispense with his services or to confirm him in service, will have to be taken after the termination of those proceedings which have been prescribed by the statutory rules, viz., Appeal Rules, because once proceedings are initiated for the termination of the services of a probationer, it cannot be said that his work and conduct during the period of probation were satisfactory so as to entitle him to confirmation. In fact, in the opinion of the appointing authority, on the recommendation of this Court, the petitioner's work and conduct were not satisfactory during the period of his probation and he was given a chance to show cause against the allegations made against him which in the opinion of the appointing authority made him unfit to be retained in service. I am, therefore, of the opinion that the petitioner in the present case did not get automatically confirmed on the expiry of the maximum period of probation or on September 17, 1969, when the permanent vacancy occurred against which he could be confirmed because the proceedings initiated against him under rule 7(3) of the Service Rules read with rule 9 of the Appeal Rules had not terminated by then. His status of probationer did not change after the expiry of the maximum period of probation although he continued to remain in service because the proceedings had been initiated before the expiry of that period of probation. For this purpose, his position in service has to be seen as on the date the show-cause notice was issued to him, that is, on October 4, 1968, and not on the date when those proceedings terminated resulting in the order of his discharge from service. On October 4, 1968, he was

admittedly a probationer and, therefore, he continued to be so during the course of those proceedings which were brought to a close by the impugned order, dated December 15, 1969. On that conclusion, the action taken against the petitioner and the order of his discharge were valid according to rule 7(3) of the Service Rules referred to above and rule 9 of the Appeal Rules."

There are some other judicial decisions to the same effect, but it is not necessary to refer to them as the learned Advocate-General does not seriously contest this proposition.

It is also to be noted that the Haryana State Government was not unaware of the requirements of rule 9 of the Punishment and Appeal Rules and that this rule applied to all the probationers. The law and Legislative Department of the Haryana Government issued guidelines regarding procedure in disciplinary cases with a preface by Shri Sarup Chand Goyal, Legal Remembrancer and Secretary to Government, Haryana, dated April 7, 1972. Paragraph 18 on page 24 of the pamphlet sets out rule 9 *ibid* and paragraph 19(d), which is relevant, reads as under:—

"19(d) It is not necessary to hold any formal enquiry where a probationer is to be discharged or reverted by a simple order. *This can be done after serving a show-cause notice stating therein the ground of such a proposal of discharge as mentioned in para* 18 *above before passing the final order.* The result would be that the probationer will be out of employment if he is a direct recruit or he shall stand reverted to his previous post from which he was promoted if he is a promotee. No exception can be taken if in the order of discharge it is mentioned that during the period of probation his performance was not satisfactory since in the case of a probationer it is the implied term of appointment that if his work was not found satisfactory during the period of probation, he will be discharged or reverted as the case may be. Thus the use of the words like 'unsatisfactory performance or unfit to hold the job' do not amount to attaching any stigma to or aspersion against him" (emphasis mine).

It is not stated in this pamphlet that there will take place an automatic confirmation if no action against the probationer for his

discharge from the service is taken before the expiry of the maixmum period of probation. The issuance of the notice has, however, been emphasised and made compulsory because the rule requires such a notice to be issued. On the other hand, the Chief Secretary to Government, Haryana, circularised memorandum No. 4183-2-GSI-71/34032, dated December 15, 1971, to all Head of Departments, the Registrar of this Court and all District and Sessions Judges in Haryana and others, in which it is definitely stated in para 3 that:—

> "In order to overcome these difficulties it has been decided that as soon as an officer/official, placed on probation in accordance with the Service rules applicable to him, has completed the period of his probation, and in any case within three months thereof, a decision should be taken whether the probation was completed satisfactorily or not, and if the probation was not completed satisfactorily, whether the original period should be extended or whether the Government employee concerned should be discharged from service/reverted to his substantive post. Where it is decided to extend the period of probation, a similar decision should be taken directly after the completion of extended period and in any case within 3 months thereof. If more than 3 months elapse after the expiry of the maximum period of probation permissible under Service Rules, then it can result in a presumption being drawn in favour of the Government employee concerned that he has completed his probation satisfactorily; and if a permanent vacancy is available, then it will be presumed (subject to the exception indicated in para 4 below) that he has been confirmed against that vacancy even though a formal order of confirmation has not been issued."

This memorandum at the end bears the signatures of the Deputy Secretary, Political and Services, for the Chief Secretary. It was, therefore, known to the Deputy Secretary, Political and Services, who was in correspondence with the Registrar of this Court that the decision with regard to the confirmation of the petitioner could have been taken within a period of three months after the expiry of the maximum period of probation, that up to October 7, 1973. There was thus no hurry to rush through the case and ask the Governor to pass the impugned order before July 7, 1973.

It is thus apparent that the State Government was fully aware of the necessity of issuing notice and that automatic confirmation does not take place immediately after the expiry of the maximum period of probation. There is, therefore, no escape from the conclusion in this case that the non-issuance of notice to the petitioner was deliberate with a view to achieve the determined goal of ousting the petitioner from the Superior Judicial Service and not because of paucity of time.

On the facts enumerated above, another serious illegality committed by the State Government and the Governor, while passing the impugned order, has been highlighted by the learned counsel for the petitioner, that is, that no consultation was made by the Governor with the High Court before passing the impugned order, which has been provided for in rule 10(3) of the Rules, assuming it to be valid and *intra vires*. There is a good deal of force in this submission. The Deputy Secretary to Government in his letter, dated June 1, 1973, referred to above, only narrated the conclusions arrived at by Kanwar Randip Singh and accepted by the Government. Three charges were held to be proved and a brief summary of facts pertaining to two such charges was stated in the letter, but no details or particulars of the incorrectly prepared judicial records were given. Neither copies of the inquiry reports nor the judicial files, perused by Kanwar Randip Singh and the Government, were forwarded to the High Court. Moreover, the letter was sent on June 1, 1973, which was the last working day of the High Court before summer vacation, affording it no time to consider that letter and send a reply thereto. The Government knew about the closure of the High Court for summer vacation, as is clear from the letter itself, and in his reply to the said letter, the Registrar of this Court informed the Deputy Secretary that the matter was under consideration and not that it did not require reconsideration or was rejected out of hand. A similar reply was sent to the letter, dated June 12, 1973, which was received during the vacation. In these circumstances, the Government should not have hastened to advise the Governor to pass the impugned order during the vacation. I have pointed out above that there was ample time yet to consider this matter, according to the instructions of the Government itself which have been reproduced above. The Governor, was, therefore, not correctly advised that the matter could not be deferred to a date later than July 7, 1973, while the High Court was to reopen on July 16, 1973. After the expiry of the maximum period of three years on July 7, 1973, there was a period of three

months to consider the matter. In these circumstances, there was no effective consideration with the High Court by the Governor, as is envisaged in the judgment of the Supreme Court in *Chandramouleshwar Prasad's case* (15) (supra). The Government was informed that the matter was under the consideration of the Hon'ble the Chief Justice and Judges of the High Court, but the State Government seemed to be in a desperate hurry to take a decision in the matter under the false notion that July 7, 1973, was a crucial date which could not be allowed to expire without passing the necessary orders. Thus, the views of the High Court were not obtained with regard to the conclusions of the Government stated in the letter of the Deputy Secretary, dated June 1, 1973, nor could they be made available because of the summer vacation which intervened. Such consultation was necessary because the Enquiry Judge appointed by the High Court had exonerated the petitioner of all the charges and allegations which were inquired into by Kanwar Randip Singh and a contrary decision given, which made it incumbent on the Governor to discuss the matter with the Hon'ble the Chief Justice and Judges of the High Court. In these circumstances all that can be said is that the High Court gave its views to the State Government on the basis of the report of the Enquiry Judge, appointed by it to hold the inquiry, which had been accepted by the High Court on its administrative side and similarly the Government conveyed its views to the High Court on the basis of the enquiry held by Kanwar Randip Singh, but thereafter there was neither deliberation nor discussion and examination of the relevant merits of each other's views. If the State Government had not been obsessed with the idea that the action to be taken could not be deferred to a date after July 7, 1973, the matter would have presented no difficulty. Effective consultation could then be held after the High Court reopened. The impugned order is, therefore, not in accordance with the rule 10(3) of the Rules and is liable to be struck down on this ground as well.

The learned counsel for the petitioner, then argued that the impugned order of the Governor casts a stigma on the judicial integrity of the petitioner and has penal consequences inasmuch as the petitioner has been removed from the post of District and Sessions Judge and, therefore, this order could not have been passed without complying with the provisions of Article 311(2) of the Constitution. The offending portion of the order of the Governor reads as under:—

> "On this analysis I cannot say that the State Government did not make adequate efforts either to obtain the views of

the High Court or to avoid its confrontation. The next point that I have to consider is whether the action now proposed by Government is justified on merits. It would be hard on the officer, Shri N. S. Rao, if he becomes a victim of this unfortunate controversy between the High Court and the Government for no fault of his. On this point, I find from the report of the Director, Special Enquiry Agency, that there is evidence of a number of lawyers to show that Shri N. S. Rao was not recording evidence strictly according to what the witnesses were deposing. This is a very serious matter. There is no reason to assume that all these lawyers were ill-disposed to Shri N. S. Rao. In any case, there seems to be no getting away from the fact that there are at least two case-records to show that Shri N. S. Rao, had acted improperly and without jurisdiction. These facts which are on record show that either Shri N. S. Rao had acted in ignorance of law or that he had deliberately acted in contravention of law. In either case, such an officer hardly deserves confirmation. It is not known whether these cases had been examined by the Hon'ble Judge, who held the enquiry into the allegations against Shri N. S. Rao and, if so, what were his findings and how he had exonerated Shri Rao completely. .....

On the material available to the Government and nothing knowing to the contrary in the records of the possession of the High Court, I cannot, therefore, say that the action now proposed by the Council of Ministers not to confirm the probationer and to revert him to his substantive appointment is unfair and improper."

These conclusions recorded in the order of the Governor clearly cast a stigma on the judicial integrity of the petitioner. But the order was not passed with the object of punishing the petitioner; it was passed with a view to determine whether the petitioner was a fit person to be confirmed in service. The detailed order of the Governor giving reasons, in which this offending portion exists, was never communicated to the petitioner. The order that was publicised and sought to be served on the petitioner was that the petitioner had been reverted to the post of District Attorney by the Governor in exercise of his power under Article 233 of the Constitution read with the rule 10(3) of the Rules and that he ceased to be a member of the Superior Judicial Service.

Reliance, however has been placed by the learned counsel for the petitioner on the judgment of the Supreme Court in the *State of Bihar* v. *Gopi Kishore Prasad* (45), the observations, wherein appear to support him. In that case, Gopi Kishore was a probationer and he was discharged from service because the Government had, on an enquiry, come to the conclusion, rightly or wrongly, that he was unsuitable for the post he held on probation. This was held to be clearly by way of punishment entitling Gopi Kishore to the protection of Article 311(2) of the Constitution. It was argued on behalf of the State that Gopi Kishore, being a mere probationer, could be discharged, without any enquiry into his conduct being made and his discharge could not mean any punishment to him because he had no right to the post. In dealing with this argument, it was observed :—

> "It is true that, if the Government came to the conclusion that the respondent was not a fit and proper person to hold a post in the public service of the State, it could discharge him without holding any enquiry into his alleged misconduct. If the Government proceeded against him in that direct way, without casting any aspersions on his honesty or competence, his discharge would not, in law, have the effect of a removal from service by way of punishment and he would, therefore, have no grievance to ventilate in any Court. Instead of taking that easy course, the Government choose the more difficult one of starting proceedings against him and of branding him as a dishonest and an incompetent officer. He had the right, in those circumstances, to insist upon the protection of Article 311(2) of the Constitution. That protection not having been given to him, he had the right to seek his redress in Court. It must, therefore, be held that the respondent had been wrongly deprived of the protection afforded by Article 311(2) of the Constition. His removal from the service, therefore, was not in accordance with the requirements of the Constitution."

These observations were explained in later cases, some of which are *Jagdish Mitter* v. *The Union of India* (25), *Champaklal Chimanlal Shah* v. *The Union of India* (27), and *the State of Punjab and another* v. *Sukh Raj Bahadur* (28)

(45) A.I.R. 1960 S.C. 689.

In *Sukh Raj Bahadur's case* (supra), the Supreme Court formulated the following 5 propositions, after consideration of the various judgments on the point:—

"(1) The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Article 311 of the Constitution.

(2) The circumstances preceding or attendant on the order of termination of service have to be examined in each case, the motive behind it being immaterial.

(3) If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.

(4) An order of termination of service in unexceptionable form preceded by an enquiry launched by the superior authorities only to ascertain whether public servant should be retained in service, does not attract the operation of Article 311 of the Constitution.

(5) If there be a full-scale departmental enquiry envisaged by Article 311, that is, an Enquiry Officer is appointed, a charge-sheet submitted, explanation called for and considered, any order of termination of service made thereafter will attract the operation of the said article."

The learned Advocate-General has stated that no disciplinary proceedings were taken in the present case, no enquiry was held with a view to punish the petitioner and that it was a straightforward and direct case of removing the petitioner, who was on probation, from the Superior Judicial Service and reverting him to his substantive post of a District Attorney, on which he held a lien. The action taken against him was under the Service Rules and no exception can be taken thereto. On these grounds he submits that Article 311(2) of the Constitution was not attracted. The entire correspondence between the State of Haryana and the High Court and order passed by the Governor clearly show that what was being determined was

the suitability of the petitioner to be confirmed in the Superior Judicial Service and while forming an opinion on that point, facts and conclusions had to be stated which were not communicated to the petitioner nor made a part of the order which was passed and notified. The reasons stated by the Governor in his order, dated June 21, 1973, remained on the official file and were not intended to be publicised. The order that was passed and communicated to the petitioner was in an unexceptionable form and having regard to the propositions laid down by the Supreme Court in *Sukhraj Bahadur's case* (28) (supra), it cannot be held that it attracted the provisions of Article 311 of the Constitution. This submission of the petitioner is, therefore, repelled.

Having dealt with the legal points involved, I now come to the allegations of *mala fides*. The learned Advocate-General has pointed out that most of the allegations have been made on information believed to be true by the petitioner, but the source of information has not been stated, so that the veracity of the allegations made cannot be ascertained and the affidavit filed does not constitute legal evidence of those allegations. The affidavits are admissible as evidence under Order XIX rule 3(1) of the Code of Civil Procedure, which reads as under:—

> "3(1). Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted; provided that the grounds thereof are stated".

It was held by the Supreme Court in *State of Bombay* v. *Purushottam Jog Naik* (30), that—

> "We wish, however, to observe that the verification of the affidavits produced here is defective. The body of the affidavit discloses that certain matters were known to the Secretary who made the affidavit personally. The verification, however, states that everything was true to the best of his information and belief. We point this out as slipshod verifications of this type might well in a given case lead to a rejection of the affidavit. Verification should invariably be modelled on the lines of Order 19, Rule 3, of the Civil Procedure Code, whether the Code applies in terms or not. And when the matter deposed to

is not based on personal knowledge the sources of information should be clearly disclosed."

In *Barium Chemicals Ltd. and another* v. *Company Law Board and others*, (32), their Lordships observed:—

"The question then is: What were the materials placed by the appellants in support of this case which the respondents had to answer? ———— But these allegations are not grounded on any knowledge but only on 'reasons to believe'. Even for their reasons to believe, the appellants do not disclose any information on which they were founded. No particulars as to the alleged discussions with the 2nd respondent, or of the petition which the said two friends were said to have made, such as its contents, its time or to which authority, it was made are forthcoming. It is true that in a case of this kind it would be difficult for a petitioner to have personal knowledge in regard to an averment of *mala fides*, but then where such knowledge is wanting, he has to disclose his source of information so that the other side gets a fair chance to verify it and make an effective answer. In such a situation, this Court had to observe in *State of Bombay* vs. *Purshottam Jog Naik* (30) that as slipshod verifications of affidavits might lead to their rejection, they should be modelled on the lines of Order XIX, Rule 3 of the Civil Procedure Code and that where an averment is not based on personal knowleldge, the source of information should be clearly deposed. In making these observations this Court endorsed the remarks as regards verification made in the Calcutta decision in *Padmabati Dasi* v. *Rasik Lal Dhar* (46). Apart from this consideration it is clear that in the absence of tangible materials, the only answer which the respondents could array against the allegation as to *mala fides* could be one of general denial.

In the light of these observations, we have to decide which allegations of *mala fides* are to be deemed as proved. Of course, those allegations which are admitted by respondents 1 and 2 shall have to be taken as proved.

(46) (1910) I.L.R. 37 Cal. 259.

The approach to be made in considering the allegations of *mala fides* in a given case is stated by the Supreme Court in *The State of Haryana and others* v. *Rajendra Sareen,* (31) in these words:—

> "Why we are saying that the approach made by the High Court in this regard in considering the allegation of *mala fides* is not proper is that the High Court has taken each allegation by itself and has held that it is not sufficient to establish *mala fides*. The proper approach should have been to consider all the allegations together and find out whether those allegations have been made out and whether those allegations, when established, are sufficient to prove malice or ill- will on the part of the official concerned, and whether the impugned order is the result of such malice or ill-will. We are emphasising this aspect because in certain cases even a single allegation, if established, will be so serious as to lead to an inference of *mala fides*. But in certain cases each individual allegation, treated separately, may not lead to an inference of *mala fides;* but when all the allegations are taken together and found to be established, then the inference to be drawn from those established facts may lead to the conclusion that an order has been passed *mala fide,* out of personal ill-will or malice."

Another principle to be borne in mind is that although the burden to prove all allegations of *mala fides* lies on the person making them, and yet he may discharge it by inferences drawn from proved facts and is not necessarily called upon to adduce direct evidence in support thereof. In *S. Partap Singh* v. *State of Punjab,* (47) their Lordships observed:—

> "Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by Government of its powers. While the indirect motive or purpose, or bad faith or personal ill-will-is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the appellent has to establish in this case, though this may sometimes be done (See *Edgington* v. *Fitzmaurice,* (48). The difficulty is not lessened when one

(47) A.I.R. 1964 S.C. 72.
(48) (1884) 29 Ch. D. 459.

has to establish that a person in the position of a minister apparently acting in the legitimate exercise of power has, in fact, been acting *mala fide* in the sense of pursuing an illegitimate aim. We must, however demur to the suggestion that, *mala fide* in the sense of improper motive should be established only by direct evidence that is that it must be discernible from the order impugned or must be shown from the notings in the file which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts."

Now I proceed to examine which of the allegations of ***mala fides*** have been established or proved in order to consider their cumulative effect. The allegations made in the petition can be divided broadly into three groups and are considered accordingly.

His Lordship considered the allegations of mala fide and then proceeded to consider the allegation of mala fide regarding the amendment of 1963 Rules with retrospective effect.

Now I shall notice the alleged acts of respondent 2 directed against the petitioner personally and these are :—

1. That in September, 1971, an amendment of the Haryana Superior Judicial Service Rules was proposed so as to change the basis of seniority of the members of that Service with a view to harm the petitioner. The draft amendments were sent to the High Court for opinion and consultation and the High Court did not agree to the proposed amendments. In spite of the opposition of the High Court, the amendments were effected in April, 1972, and were made retrospective with effect from April 1, 1970. This fact, according to the petitioner, clearly shows that respondent 2 acted maliciously with a view to harm him in his service career. In reply; the amendment of the rules is admitted. It is also admitted that the High Court did not agree to the amendments being made but it is denied by respondent 2 that the amendment of the rules was aimed at harming the petitioner in his service career. The amendments were made in order to redress the long standing grievance of the members of the Haryana Civil Service (Judicial) to the effect that the seniority should be determined on the continuous length of service rather than from the date of confirmation, the reason being that many H.C.S. Officers continued

to officiate as District/Additional District and Sessions Judges for many years and were not confirmed while a direct recruit used to be confirmed on the expiry of two or three years' period of probation. The grievance of the H.C.S. Officers was found to be just and redress was granted to them by the amendment of the rules. The petitioner has himself admitted in his writ petition that the members of the H.C.S. (Judicial) had been making this demand for a long time but has stated that since he was the only direct recruit in the Service at that time, the amendment was made with the singular object of harming him which is clear beyond doubt from the fact that the amendments were made retrospective with effect from April 1, 1970, i.e., a date earlier than three months before he entered the service. The learned Advocate General has submitted that the amended rules did affect the petitioner and the future direct recruits but the amendment was not made with the sole object of harming the petitioner. It is then submitted that the amendment of the rules was made by the Governor in exercise of his powers under Article 309 of the Constitution which is legislative power and not an executive power. It was held by me in *K. D. Vasudeva, I.A.S. and others*, v. *The Union of India and others*, (49) :

> "It is well-known that retrospective legislation can be made only by the sovereign legislature, that is, by Parliament for the whole country in respect of the field of its legislation, and by the State legislature in respect of the subjects within its jurisdiction for the State. Service rules having retrospective effect can also be made by the President of India and the Governor of a State in exercise of the powers under the proviso to Article 309 of the Constitution, which is a legislative power, but no subordinate or delegated authority can frame rules or regulations having retrospective effect."

In B. S. Vadera v. *Union of India and others*, (34), it was stated :—

> "It is also significant to note that the proviso to Article 309, clearly lays down that 'any rules so made shall have effect, subject to the provisions of any such Act': The clear and unambiguous expressions, used in the Constitution, must be given their full and unrestricted meaning unless hedged-in by any limitations. The rules, which have to be 'subject to the provisions of the Constitution,' shall have effect, 'subject

(49) 1971 S.L.R. 487.

to the provisions of any such Act'. That is, if the appropriate Legislature has passed an Act, under Article 309, the rules, framed under the proviso, will have effect, subject to that Act; but, in the absence of any Act, of the appropriate Legislature, on the matter, in our opinion; the rules; made by the President; or by such person as he may direct, are to have full effect, both prospectively and retrospectively: Apart from the limitations; pointed out above, there is none other, imposed by the proviso to Article 309, regarding the ambit of the operation of such rules. In other words, the rules, unless they can be impeached on grounds such as breach of Part III, or any other Constitutional provision, must be enforced, if made by the appropriate authority:"

This judgment was referred with approval by the Supreme Court in *The Income-tax Officer, Alleppey* v. *I.M.C. Ponnoose and others*, (35), in which it was further explained that—

// "This view was however, expressed owing to the language employed in the proviso to Article 309 that 'any rules so made shall have effect subject to the provisions of any such Act' As has been pointed out, the clear and unambiguous expressions used in the Constitution must be given their full and unrestricted meaning unless hedged-in by any limitations. Moreover, when the language employed in the main part of Article 309 is compared with that of the proviso; it becomes clear that the power given to the legislature for laying down the conditions is identical with the power given to the President or the Governor, as the case may be, in the matter of regulating the recruitment of Government servants and their conditions of service. The legislature, however, can regulate the recruitment and conditions of service for all times whereas the President and the Governor can do so only till a provision in that behalf is made by or under an Act of the appropriate legislature. As the legislature can legislate prospectively as well as retrospectively, there can be hardly any justification for saying that the President or the Governor should not be able to make rules in the same manner so as to give them prospective as well as retrospective operation."

Reference may also be made to *Gullapalli Nageswara Rao and others*, v. *Andhra Pradesh State Road Transport Corporation and*

another, (50) and *N. Srinivasan* v. *State of Kerala,* (33). It is, therefore, not open to the petitioner to challenge the amendment of the rules on the plea of *mala fides* of respondent 2. If *mala fides* were to be alleged, the allegation should have been made against the Governor who was the legislative authority and effected the amendment in the rules and not respondent 2.

2. The petitioner was posted as officiating District and Sessions Judge, Karnal, with effect from September 5, 1972 by the High Court and the relevant notification was sent to the Government for Publication in the Government Gazette, which was not published and a letter was written to the High Court on October 13, 1972, protesting against that posting. A letter was also sent by respondent 2 to Shri H. R. Gokhale, Union Minister for Law and Company Affairs, on October 24, 1972, complaining that the High Court had appointed a comparatively young officer as District and Sessions Judge. These facts are admitted but it cannot be said that they show any malice or ill-will on the part of respondent 2. There was a dispute as to who had the power to appoint a District and Sessions Judge, that is, whether the Governor or the High Court, and the letter to Shri Gokhale only shows that respondent 2 felt that the petitioner, who had only a little more than two years' service to his credit, was too young to hold the post of District and Session Judge. It is very difficult to spell out malice on the basis of this letter.

3. In February, 1973, a copy of the letter addressed to Shri H. R. Gokhale by Shri Bhagwat Dyal Sharma, was sent to respondent 2 for comments. In his letter Shri Bhagwat Dyal Sharma had stated that the amendments in the Superior Judicial Service Rules had been effected with a view to harm the interests of the petitioner. On the receipt of that letter from Shri Gokhale, respondent 2 formed an opinion that the information had been disclosed to Shri Bhagwat Dyal Sharma by the petitioner and he wrote to the Hon'ble the Chief Justice to take action against him under the Government Servants Conduct Rules. The Hon'ble the Chief Justice asked for the explanation of the petitioner who denied that he ever approached Shri Bhagwat Dyal Sharma or any other politician and gave him the particulars of the case. That explanation was evidently accepted and was forwarded to respondent 2. This fact again does not prove any malice on the part of respondent 2. It is consistent with a *bona fide* opinion having been formed that the petitioner had approached a politician for the redress of his grievance and had thus acted in a

(50) A.I.R. 1959 S.C. 308.

manner unbecoming of a Government servant. No further action was taken after receipt of the letter from the High Court and it is not the basis of the order passed by the Governor refusing to confirm him. It cannot, therefore, be held that the impugned order was passed as a result of *mala fides* of respondent 2.

4. That the confidential enquiry through Kanwar Randip Singh was ordered by respondent 2. I have already dealt with this matter at its appropriate place and no further comments are necessary to be made at this place.

In this connection it may also be mentioned that the Governor passed a detailed order running into seven typed pages which shows that the entire material supplied to him by the State Government and the Council of Ministers had been studied by him personally and he had come to an independent conclusion that the petitioner was not a fit person to be confirmed. After having come to the conclusion, he stated that he was contrained to accept the advice of the Council of Ministers not to confirm the petitioner. It is not a case in which the Governor without applying his own mind accepted the advice of the Council of Ministers and acted thereupon. The allegations of *mala fides* against respondent 2 are, therefore, misplaced and misconceived in this case since no allegations of *mala fides* have been made against the Governor who passed the operative order. It is also pertinent to note that the action was not taken by the Chief Minister alone. The matter was brought before the Council of Ministers and a Sub-Committee was appointed. The report of the Sub-Committee was again considered by the Council of Ministers and a decision arrived at. The allegations of *mala fides* only against respondent 2 thus lose all force. Nothing has been alleged against the other Ministers of the Government.

After carefully considering all the facts which have been established or proved, I am of the opinion that the allegation of *mala fides* levelled by the petitioner against respondent 2 has not been established and the impugned orders cannot be struck down on that ground. However, as a result of the above discussion on other points, this petition succeeds and is allowed with costs against respondent 1 and the impugned orders, copies of which are Annexures 'J' and 'J-1' to the writ petition, are hereby quashed. Respondent 1 shall pay the costs of the petitioner.

R. S. Narula, J.—I have had the benefit of reading each of the separate judgments prepared by Sarkaria, J. and Tuli, J. On the main

constitutional question whether the confirmation of a probationer in the Haryana Superior Judicial Service is a part of the powers of the Governor under Article 233 to appoint a District Judge, or if it partakes of the control of the High Court under Article 235, I agree with the view and the reasoning of Sarkaria, J. The decision of both the learned Judges on all other points mooted before us is the same and I agree with them on all those points.

Harbans Singh, C. J.—Having very carefully gone through the judgments prepared by Sarkaria, J., and Tuli, J., I am also of the same view as Narula, J.

D. K. Mahajan, J.—I have gone through the judgments prepared by Sarkaria J. and Tuli J. I only wish to add that this case has some very unusual features and the reasons for the impugned order are not what are stated to be. However, I entirely agree with the judgment of Tuli J., and have nothing to add.

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