GUJARAT HIGH COURT

Sankalchand Himatlal Sheth

Vs.

Union Of India

Special Civil Application No. 911 of 1976

(J.B. Mehta, A.D. Desaia and D.A Desai, JJ.)

04.11.1976

JUDGMENT

J.B. Mehta, J.

1. The petitioner who was a Judge of this Court challenges in this petition the order of his transfer dated May 27, 1976 at Annexure "A". The short facts which have given rise to this petition are as under.

2. The petitioner was enrolled as an advocate of the Bombay High Court on January 28, 1946. He practiced at Bombay since his enrolment until April 30, 1960 and on the formation of the Gujarat State, he shifted his legal practice to this High Court where he practiced till April 22, 1969. On April 23, 1969 he was appointed a Judge of the Gujarat High Court for a period of two years and was appointed a permanent puisne Judge on August 5, 1970. The petitioner' would retire on completion of the age of 62 years on January 5, 1981 and so, a period of about four years and six months was left for him to retire from service.

3. The petitioner has been transferred by the impugned order to the Andhra Pradesh High Court without obtaining his consent, without consulting him and against his will. As fifteen other Judges were also transferred, the petitioner believed that they also were so transferred without their consent and without any prior consultation with them.

4. The petitioner's case was that on a true interpretation of Article 222(1) of the constitution as per the true history and setting and context of that provision, this power could not be exercised without the consent of the concerned Judge as this was a constitutionally guaranteed tenure for the purpose of securing the independence of the Judges. The petitioner had relied upon promissory estoppel based on the speech of the then Law Minister, Mr. A.K. Sen, in 1963 while speaking on the Fifteenth Amendment of the constitution where this principle and convention

had been in terms accepted by the Government of India, and on the faith of it the petitioner and other Judges having accepted judgeship, there was clearly a promissory estoppel and so also, the transfer order was challenged as illegal and void. The petitioner pointed out the various personal and public injuries which would result because of such a transfer without the consent of the Judge concerned and pointed out that such compulsory transfers on a large scale were likely to undermine public confidence in the administration of justice because a Judge, as per the oath of office, had to decide without fear or favor between the state and the individual litigant. That is why this practice of not transferring judges without their consent to another state had been uniformly followed all these years. The petitioner further relied on the fact that these large scale transfers suffered from want of application of mind because these injuries to the individual and to the public ought to have been taken into account and as such orders were likely to demoralize the higher judiciary. It was further the case of the petitioner that the sixteen Judges had been transferred not for the purpose of improving the administration of justice but on account of the independence, objectivity and fearlessness shown by them while discharging their judicial functions and the instances of these transferred Judges had been pointed out including the petitioner himself who had given decisions against the Government in important cases. It was, therefore, contended that the petitioner's transfer was penal in character.

5. The petitioner also contended that the constitutional requirement of presidential consultation with the Chief Justice of India was a substantial requirement and not a formal or empty requirement. The Chief Justice had a duty to point out the public and personal injuries which would have been occasioned by such transfers with their consequent effect on the administration of justice, independence of judiciary and rule of law. The petitioner being not aware of the fact of any such effective consultation and whether such personal and public injuries were brought to the notice of the president of India by the learned Chief Justice, the fact was not admitted. It was also averred that the learned Chief Justice should have brought to the notice of the president the aforesaid statement made by the Government of India in 1963 and after all these relevant factors had been brought to the notice of the president, by the learned Chief Justice, if the advice was disregarded from the head of the judiciary, the power would not be exercised for the purpose for which it was conferred and the transfer order would be void. The consultation with the learned Chief Justice being a safeguard against individual transfer, the safeguard had totally failed in such mass transfers because the learned Chief Justice had not thought it fit to convene a conference of the Chief Justices and Judges of the High Courts who were vitally concerned with the independence of the judiciary and the proper administration of justice in order to ascertain the views of the judiciary and convey them to the president. That is why, the learned Chief Justice was joined as a proper party without claiming any relief against him in this petition.

6. Therefore, the aforesaid transfer order was challenged on four grounds:

> (i) that the compulsory transfer was in violation of Article 222 of the constitution as it was without the consent of the Judge;

(ii) that it was legally unsound because it had been ordered in breach of the assurance given by the Government of India on the floor of the parliament on the faith of which the petitioner had joined the judiciary and so the Government was bound by a Promissory Estoppel,
(iii) be cause it was legally unsound and militated against public interest, and
(iv) because the condition precedent of effective Consultation to the exercise of power under Article 222(1) had not been satisfied.

7. The affidavit-in-reply was filed only by Mr. R. Vasudevan, Deputy Secretary to the Government of India, Ministry of Law, Justice and Company Affairs, (Department of Justice and no affidavit-in-reply was filed by the learned Chief justice, but the Additional Solicitor General, Mr. Raman, has appeared for both the respondents at the hearing. The case of the union was that a Judge's liability to transfer was a constitutional obligation to which he was subjected, as his fixity of tenure or immutability of his salary or perquisites was his constitutionally safeguarded right. It was pointed out that in Mr. A.K. Sen's speech the emphasis was clearly on the power of the president to transfer a Judge from one High Court to another being unfettered and the "convention" in the context could never fetter such a constitutional power and no such promissory estoppel could be relied upon against such a constitutional provision. No assurance was given to the petitioner at the time of his appointment that he would not be transferred, save with his own consent. It was the case of the union that the apprehension of the petitioner that the transfer undermined the judiciary was absolutely unfounded and incorrect. On the contrary, it was the considered opinion of the Central Government that the policy of effecting all India transfers of High Court Judges would not only strengthen the administration of justice but also promote healthy traditions in the interest of dispensation of justice in the country. In fact, the speech of the law Minister on April 30, 1963 referred to such a transfer being a good thing and he said:

"It is therefore necessary if we accept that it is a good thing, that it is a desirable thing, for the purpose of national integration to have judges drawn from different states, so that the highest judicial tribunal in every state contains elements from other states and we have an all-India atmosphere running through our entire judicial life and strengthening it and giving it a national outlook, for good or for bad. People may differ with regard to that objective. We have by and large accepted it as a desirable thing. We feel that it is absolutely essential for the purpose of national integration and for introducing a robust national outlook into our judicial system that judges should be transferred from one High Court to another, so that there is an element from outside the particular state in the highest judicial tribunal free from local bias, free from local prejudices and completely devoted only to the supreme task of administering justice equally and impartially."
In fact, the speech of the petitioner himself when he moved the resolution on the subject of transfer at the first Gujarat State Lawyers' Conference in 1967 was vehemently relied upon. The need to implement Article 222 had been forcefully espoused by the petitioner

at that time and so it was contended that the force of his logic could not in any way be diluted, when the principle so ably expounded, came to be applied to his own case. It was pointed out that views were expressed all over India from various sections of public urging the Government to effect all-India transfers of High Court Judges which according to them would be in the larger interest of the higher judiciary and the litigant public of the country. Even the reorganisation commission in its report in 1957 had expressed the view that if a substantial number of Judges in a High Court came from outside the state, it would greatly tend to develop a feeling of unity throughout the country and help in arresting parochial trends. The commission recommended that "at least one third of the number of Judges in a High Court should consist of persons who are recruited from outside the State".

It was also opined by the commission that a "judiciary composing of judges from outside the state would be more independent having less local connections". Therefore, it was pointed out that the apprehension of the petitioner that the independence of the judiciary would be undermined by transferring Judges from one state to another was unfounded and contrary to the petitioner's own publicly pronounced views in 1967. Such transfers really strengthen national integration and promote judicial independence cutting at barriers of regionalism and parochialism and avoiding evils resultant from over localisation of interests and influence. The individual inconveniences were compensated by the compensatory allowance under Article 222(2) and because of the provision made in the rules for travelling allowances in Rule 7A(1) under which the transferred Judges would enjoy better terms than their colleagues. The problem of language was stated to be hardly a relevant argument in the context of exercise of this power of transfer because the avowed object of national integration sweeps across such linguistic or parochial considerations. The considered view of the Government from the experience in the past was that no such difficulty was experienced by the transferred Judges. It was pointed out that moreover all these matters could be considered at the time of making an order of transfer and had no bearing at all on the exercise of this plenary power. The Government had denied that the sixteen Judges had been transferred on account of their independence, objectivity and fearlessness and it was the stand of the union that the Chief Justice had been unnecessarily impleaded in the petition and the reasons given, therefore, were not valid or correct. Finally it was urged that it was neither open to the petitioner to question or enquire, how and in what manner the president of India had consulted the Chief Justice of India before issuing the orders of transfers. It was pointed out that the order of transfer having taken effect by virtue of Article 217(1)(c), the petitioner had ceased to be a Judge of the Gujarat high Court and so the petition had become in fructuous. In the annexure the instances of ten Judges and fifteen Chief Justices who were transferred before the date of the present transfers had been set out. The petitioner had filed his rejoinder controverting the statements made in the affidavit-in-reply.

8. Before we go to the contentions raised in this matter, at the outset we would dispose of the

preliminary objection raised on behalf of the union Government as to this bench hearing this matter on the ground of bias. It should be borne in mind that the constitution of this Full Bench was announced long before the hearing and the parties had even moved this bench for seeking adjournments. In fact, the hearing had continued on the first occasion for the whole day. The very fact that no objection had been raised till that time, makes it in terms clear that the union found no such ground for raising any such objection against the constitution of this bench for hearing this matter only because the petitioner was a Judge of this Court. In fact, no such contention could have been urged in this matter regarding the conditions of service of Judges because this was the superior Court of plenary original jurisdiction created by the constitution for entertaining such a writ petition under our constitutional scheme. This objection was for the first time taken on the next day of hearing on August 31, 1976 on the ground that it had come to the knowledge of the union that a letter had been addressed to the Chief Justice to which the judges constituting this bench were parties in which an opinion touching some of the issues arising in this petition had been expressed. The Additional Solicitor General, Mr. Raman, stated that the Government of India had, therefore, apprehension that it might not get a fair deal and a just decision in this matter. Mr. Raman had made it in terms clear that he had instructions to raise this objection and it was not raised at the outset as the relevant fact about this letter came to his knowledge only after the hearing had started on the earlier day. The objection being of a serious nature, even Mr. Raman also wanted time for considering whether he would press that objection and the matter was, therefore, adjourned to September 13, 1976 so that he could consult respondents and thereafter formulate this objection so that the petitioner could meet the same. In view of the peculiar and exceptional circumstances of this matter and as the objection was resting on the letter written by us whose contents were not known to the parties while we alone knew it, we recorded the following order on September 10, 1976:

> "An objection having been taken that, because of a letter addressed to the Chief Justice, to which Judges constituting the bench are parties, in which an opinion touching some of the issues arising in this petition is expressed, the Government of India has apprehension that it may not get a fair deal and just decision in this matter.
>
> "Government of India and the counsel for the petitioner stated that they have no knowledge about the contents of this letter, while we know it. Therefore, even though this letter is a highly confidential communication, which would not be ordinarily allowed to be disclosed, we and our colleagues, who are signatories to the letter, have no objection, in view of the peculiar and exceptional circumstances of this matter, if the Chief Justice, the addressee of the letter, desires to produce it.
>
> The matter had been further adjourned to September 20, 1976 so that Mr. Raman could contact even the learned Chief Justice who was a party to this matter as he was not available at that time, being out of India. When the matter was again taken up on September 20, 1976 the written formulation had been made m this behalf of the objection of the first respondent and some of the incorrect statements made therein were denied in the reply filed by the petitioner. Even on that day as this bench was not keen to hear this

matter, we had even, without creating any precedent, agreed to the request made for adjournment to enable the parties to move the learned Chief Justice of this Court for constituting another bench as was suggested in the aforesaid written formulation. The parties thereafter on September 22, 1976 moved the learned Chief Justice by a joint application for constituting another bench with himself presiding over the new bench as stated therein. The learned Chief Justice, however, passed an order on September 22, 1976 constituting the same Full Bench to hear this part-heard writ petition on the same day at 2.45 p.m. and accordingly the hearing was resumed. It is in the background of these circumstances and the relevant facts that the objection of bias which has been raised before us has to be considered keeping in mind the crucial fact that the letter on which the same is sought to be raised being a highly confidential communication addressed by us to the learned Chief Justice of India along with other Judges could not come on the record to enable the parties to have their say on it.

9. The legal position in this connection is very well settled. In *Nageswararao v. State of Andhra Pradesh*[1] the principles governing the doctrine of bias were stated to be (i) no

[1] A.I.R. 1959 S.C. 1976 at 1978

man shall be a Judge in his own cause, (ii) justice should not only be done but manifestly and undoubtedly seem to be done. The two maxims yield the result that if a member of a judicial body is "subject to a bias (whether financial or other) in favour of, or against, any party to a dispute, or is in such a position that a bias must be assumed to exist, he ought not to take part in the decision or sit on the tribunal; and that "any direct pecuniary interest, however small, in the subject-matter of inquiry will disqualify a Judge, and any interest, though not pecuniary, will have the same effect, if it be sufficiently substantial to create a reasonable suspicion of bias." These principles apply equally both to Courts of justice and judicial Tribunals, who have to Act judicially in deciding the rights of others, i.e., authorities who are empowered to discharge quasi-judicial functions. Their lordships considered also the incidental question as to whether the doctrine of bias was qualified to the extent of the statutory authorization, the decision of the house of lords in From *United Breweries Co. Ltd. v. Bath Justices*[2] and the decision in Rex Leicester Justices 1927 (i) K.B. 557 (565), had been considered and it was pointed out that the decisions revealed that in England a statutory invasion of the common law objection on the ground of bias was tolerated by decisions, but the invasion was confined strictly to the limits of the statutory exception in such cases where some risk of bias was inseparable from the machinery which parliament had set up. That is why even though the matter related to the Judges' own conditions, because this was the only Court created for exercising original writ jurisdiction in such a matter, this point had rightly not been raised at the earlier stage and had been acquiesced and waived. It was only on the ground of the aforesaid letter that the point has been sought to be raised.

10. Even on that question the legal position has been settled after the decision in *Viswanathan v. Abdul Wajid*[3], There the objection of bias was raised because Balakrishanaiya J., had delivered a

judgment on the merits of the dispute and had incorporated therein the final order to be passed in the appeal, and thereafter he referred the case to the Full Bench and sat as a member of the Full Bench after making up his mind on" the merits of the appeals. Therefore, the objection was raised that Mr. Balakrishanaiya being biased and having predilections because of his having made up his mind on the merits of the dispute of which fact the judgment delivered by him was the strongest evidence, he was incompetent to sit in the Full Bench for hearing the appeals. Their lordships pointed out at page 28 that from the circumstance that of the bench as constituted, Mr. Balakrishanaiya was a member, no inference of bias could be raised because Mr. Balakrishanaiya had stated that he had given opportunity to the parties to move the Chief Justice for constituting another bench and as the bench was not changed, he was hearing that matter. Various decisions were considered and it was in terms pointed out that a judge tentatively expressing an opinion which was not final would never be disqualified on the ground of bias but where a final opinion had been expressed, even though there was a practice, which had arisen from historical reasons in England taking such a technical view permitting a Judge, to sit in appeal against his own judgment or in cases in which he had an opportunity of making up his mind and to express his conclusion on the merits of the dispute, it had little to comment itself for acceptance and that fact would have to be kept in mind. Even in the ether concurring judgment on this question at page 51 it has been in terms pointed out that merely because a Judge expressed opinion, tentatively formed, sometimes even strongly, that would never mean that the case had

[2]1926 A.C.586

[3] AIR 1963 S.C. 1

been prejudged. At page 49 also it was pointed out that objection raised against Mr. Balakrishanaiya J., sitting on the full bench could hardly be justified because there were several cases in which Judges who had made a reference to a larger bench sat on the bench, even though they had earlier expressed an opinion. Some of them had also changed their views later. In fact, there was no law to prohibit this and in a small Court with limited number of Judges this was unavoidable. It was not expected that ad hoc Judges would be appointed every time such a situation arose.

11. Therefore, in any event, one thing is settled that merely because judges have ex parte written some letter, it could never be urged as a ground for bias against the bench on the score of violation of principles of natural justice. Their lordships have emphasized that what would disqualify is the final expression of opinion. Ex-parte opinions or even views expressed at the discussions could hardly be said to be pre-deciding the issues and no litigant who is familiar with the court practice of speaking Judges would ever carry any such impression.

12. Even in *T.G. Mudaliar v. State of Tamilnadu*[4], the settled practice was pointed out that merely because a tentative decision had been reached by some committee which was not a final or irrevocable decision but only a policy decision to advise the State Government how to implement the policy on nationalization, that could neither expressly nor by necessary implication involve a

pre determination of the issue. Therefore, even though to a road transport scheme preparation the secretary to the Government was a member of the committee to prepare a scheme in his capacity as secretary, he could not be said to be biased or disqualified from hearing the petition.

13. We are surprised at this objection coming from the union Government itself when it was sought to be raised on such a letter written to the learned Chief Justice of India. Mr. Raman representing the learned Chief Justice who was respondent No. 2 in this matter rightly confined his objection only so far as the first respondent was concerned. Such an objection is always unheard of by anyone acquainted with judicial procedure of hearing. In *Cordell v. Second Clanfidd Properties Ltd*[5]. Megarry J., who had expressed views as an author had pointed out while dealing with the same matter that he was exposed to the peril of yielding to preconceptions, because he lacked the advantage of that impact and sharpening of focus which the detailed facts of a particular case brought to the judge. Above all, he had to form his ideas without the aid of the purifying ordeal of skilled argument on the specific facts of a contested case. Argued law was tough law. At the Court hearing he was exposing those views to the testing and refining process of argument. Therefore, unless a matter is argued before a Judge and final decision is reached after hearing both the parties, no question would arise as to whether the Judge had made up his mind because a Judge is always known to all the litigants to be open till the last minute to persuasion and argument and such an objection is unheard of merely because some letter is written by the Judges in a confidential capacity to the highest head of the judiciary.

[4] AIR 1973 S.C. 974
[5](1959) 2 Ch. 9 at page 16

14. In this context Mr. Seervai had rightly relied upon the decision in *United States v. Morgan*[6] at pages 1434-35 where the objection had in terms arisen in the context of the secretary who had legal authority to make the rate order having previously written a letter to the New York times after the earlier Morgan case 304 U.S. 1, 82 L.Ed. 1129 of the Supreme Court, where the earlier 1933 order was quashed because of procedural defects and under which he assumed that impounded funds would have to be returned to the market agencies and, therefore, the secretary had vigorously criticized that decision of the Supreme Court. In that decision the united states Supreme Court had in terms pointed out that merely because the secretary expressed written views on matters believed by him to have been in issue, did not, render him unfit for exercising his duty in subsequent proceedings ordered by the Supreme Court. As well might it be argued that the judges below, who had three times heard the case, had disqualifying convictions. In publicly criticising the Supreme Court's opinion the secretary merely indulged in a practice familiar in the long history of Anglo-american litigation, whereby unsuccessful litigants and lawyers gave vent to their disappointment in tavern or press. Cabinet officers charged by congress with adjudicatory functions were not assumed to be finally creatures any more than Judges were. Both might have an underlying philosophy in approaching a specific case but still both were assumed to be men of conscience and intellectual discipline, capable of judging a

particular controversy fairly on the basis of its own circumstances and there was nothing on the record which disturbed such an assumption. That is why in *Reg. v. Mayor and Justices of Seal*[7], Cave J. Emphasising the aspect of real bias in favour of one of the parties to the litigation, in terms held that mere expression of opinion for or against the interest of a party was not sufficient to disqualify the person who had expressed it from adjudicating in a matter in which the party was concerned.

15. Really these are cases where at the most what could be urged would be an official bias. In Registrar of Co-operative *Societies v. Sharam Chand*[8], where the registrar had issued notice for removal of the managing committee under the Co-operative Societies Act on the report of investigating auditors on the basis of collective responsibility of the Managing Committee, it was held that the proceeding under that notice had nothing to do with the misfeasance proceedings against certain members of the Managing Committee on their individual responsibility and that it could not be held that the registrar was biased in the investigation of individual responsibility of various members of the managing committee and, therefore, the objection on the ground of official bias disentitling him to Act as a Judge or arbitrator was negatived.

16. In fact the Full Bench decision of this Court has been now reversed on this question of bias in *Ahmedabad Municipality v. Ramanlal*[9], where it is in terms held that the conferment of power under Section 437A(1) on the Municipal Commissioner as an administrative officer to take proceedings for eviction could not be struck down as unreasonable on the ground that he was a Judge in his own cause. He was the highest officer of the corporation. The corporation Acted through those officers. There was no personal interest of the Municipal Commissioner in evicting those persons. The

[6]85 Lawyers Edition 1429 [8] A.I.R. 1961 S.C. 1743

[7] Ex-parte Coring Law Times Reports Vol. 45, September 1881 to February 1882, p. 439 at p. 441

[9] A.I.R. 1961 S.C. 1743

corporation represented public interest. The Municipal Commissioner Acted in public duty in aid of public interest. The Municipal Commissioner would apply his mind to the facts and circumstances of a given case as to whether there should be an order for eviction. The further fact which was borne in mind was that if the municipal Commissioner wrongly exercised his power, the Action could be corrected in appeal.

17. On identical reasoning, no such objection of bias could be urged before the Judges of this bench merely on the score of that letter because now when the matter has judicially arisen, it would be tested after going through the entire purifying process of rival arguments after fully hearing the parties and if the decision of this Court was found to be wrong, it would be tested in appeal before the Supreme Court. This voluminous citation has been made to emphasize that such an objection is unheard of so far as Judges are concerned who are known to the public to reach final decision only after the matter is fully heard and whatever views are tentatively expressed, in the course of discussion, even after the controversy has arisen in the Court, would never convey any impression on the litigant that the Judges had made up their mind. Even though ordinarily a litigant could not be allowed to choose the personnel of the Courts, in this

matter in order to allay all possible misapprehension that this bench was in any way keen to hear and decide this case, adopting a rather unusual course, we permitted the parties to request the learned Chief Justice of this Court to constitute another bench, and even the petitioner had been willing to have the matter taken up by another bench if the learned Chief Justice was willing to constitute another bench where he sat as requested by the parties even though he was a transferred Judge himself. Once the learned Chief Justice decided to constitute the very bench, the objection on the score of bias completely ends so far as this bench is now concerned which would be duty bound to decide this matter. To maintain an appearance of justice, if this bench now refuses to hear, the petitioner would be completely denied justice. It is a poor consolation to the petitioner to be told that the proper forum created by the constitution for dealing with this matter would refuse to exercise jurisdiction on this wholly untenable and unfounded objection for which no basis of facts could ever be laid out in the peculiar circumstances of the case, and that he should go to some other High Court where the petitioner could hardly know or inquire whether the Judges there also had written any such letter or not.

18. In this context Mr. Seervai rightly relied upon the pertinent observations of the court of appeal in *Regina v. Camborne Justices*[10] After referring to the frequency with which such allegations of bias were being made relying on Lord Hewart's observations in Sussex Justices Case (1924) 1 K.B. 256-259, that "it is of fundamental importance that justice should not only be done, but should manifestly arid undoubtedly be seen to be done" the learned Judges pointed out whilst indorsing and fully maintaining the integrity of the principle reasserted by lord hewart that the continued citation of it in cases to which it was not applicable might lead to the erroneous impression that it was more important that Justice should appear to be done than that it should in fact be done. We can never be a party to an illusion or a shadow being maintained denying the substance or the real Justice by entertaining this unfounded preliminary objection. The preliminary objection is, therefore, overruled.

19. On the merits Mr. Seervai has raised the following three questions:

[10](1955) I.Q.B. 41 at page 52

(1) whether on a true construction of Article 222(1) the transfer of a high Court Judge could only be made with his consent after consultation with the Chief Justice?

(2) whether the speech made by Mr. A.K. Sen in 1963 set out in paragraph 6 constituted a promissory estoppel in respect of the petitioner who accepted Judgeship in 1969?

(3) whether the power of the president under Article 222(1) was unfettered or whether there were conditions for the exercise of this discretionary power and the salutary conditions had not been fulfilled in the present case?

20. Article 222 of the Constitution runs as under :

"222. (1) The president may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.

(2) when a Judge has been or is so transferred, he shall, during the period the serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by parliament by law and, until so determined, such compensatory allowance as the president may by order fix."

It should be noted that this original Clause (2) which was omitted by the Constitution (Seventh Amendment) Act, 1936, was reintroduced by the Constitution (Fifteenth Amendment) Act, 1963 and it was at that time that the speech of the Honourable Minister Mr. A.K. Sen has been made which has been relied upon.

21. The first contention of Mr. Seervai is based on the true construction of this provision of transfer in Article 222(1). This being a constitutional provision in the context of the highest judiciary of the state, the provision would have to be carefully interpreted in the light of its entire context, setting and purpose so as to give full effect to it. The constitution being a dynamic document and its whole scheme being one integrated whole, this pragmatic instrument would have to be interpreted by the context, purpose, teleological approach keeping in mind the literal rule rebuke embodied in justice frankfurter's observation:

"There is no surer way to misread a document than to read it literally. *Massachusetts & Insurance Co. v. U.S*[11]. The Constitution being a revelation of great purposes which were intended to be achieved by it as a continuing instrument for the organic growth of the country all resources on statutory interpretation or relevant material would have to be explored by a purposeful functional interpretation looking to the object, considering the mischief, social and historical background and the entire provision as a whole in its proper context and setting. Such an important constitutional provision could not be read in vacuo but as occurring in a single complex pragmatic organic instrument in which one part may throw light on another and therefore we must give due regard to all the relevant materials by exploring all the avenues for ascertaining the true legislative intention by (1) examining the historical social background to identify the state of

[11](1966) 232 U.S. 123 at p. 138

affairs existing at the time of the enactment of the provision; (2) a conspectus of the entire scheme of the provisions made regarding the judiciary; (3) particular regard to the entire scheme object and purpose underlying; (4) scrutiny of the Actual words of this provision which would have to be interpreted in the light of the established canons of interpretation; (5) and examination of the other provisions which had been relied upon as throwing light on the particular words which are the subject of interpretation. It would, thereafter be possible for us to find out whether these various avenues or approaches lead in different directions or whether they lead to an identical conclusion.

(A) Historical and social background and the real objective, with special safeguards for the lower and the higher judiciary.

22. As regards the social background, our freedom fighters when they I dined this constitution had before them the lessons of English history as to how the enactment of the Act of settlement in 1700 gave the English Judges for the first time their independence in reality, after which both in fact and in law they held office during good behaviour so that right conditions for the growth of full judicial integrity could exist. The judicial committee in *Liyange v. The Queen*[12] had after referring to the judicature provisions in the Ceylon Independence Act, 1947 rightly observed-

> These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a constitution by which it was intended that judicial, power should be shared by the executive or the legislature. The constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature.
>
> Further proceeding, the Privy Council uttered a warning which must always be borne in mind in dealing with such constitutional cases:
>
> What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the constitution.
>
> Our founding fathers, therefore, took great pains to vest judicial power in the judiciary i.e., the High Court and the Supreme Court as observed by his lordship Beg J., in Prime Minister's case by the learned Chief Justice at p. 2320, because it is only the High Court and the Supreme Court which under our constitution can decide what is legal or illegal and strike down as ultra vires all excesses of power committed by the executive, legislature or any other organ of the State, Vide *Sangram Singh v. Election Tribunal Kotah*[13], His lordship Chandrachud J., at pp. 2470-71 while interpreting our constitution in the backdrop of the national struggle for independence held that our peculiar concept of "co-operative federalism" involved the distribution of powers between three coordinate branches of Government, and disputes regarding the limits of constitutional power had to be resolved by Courts, and therefore the distinction between judicial power and other powers must be held to be vital to the very maintenance of the

[12](1967) 1. A.C. 259

[13] AIR 1955 S.C. 425

> constitution itself, for power was in its nature of an encroaching nature.

23. In the directive principles, the whole direction of evolution of the social order in our welfare state having been laid down as in article 38 in which justice, social, economic and political, would inform all the institutions of the national life, and justice, social, economic and political being the very objective in our preamble while forming the sovereign democratic republic, these enshrined values were intended to be made a practical reality by taking concrete measures for

securing a fearless independent judiciary and that is why in Article 50, the directional imperative was that the state shall take steps to separate the judiciary from the executive in the public services of the state, after the freedom fighters had the experience of the evils which existed in the days before our constitution because of want of such separation. It is in the light of this historical background that these provisions implementing the founding faith or the cardinal principle of independent judiciary have to be examined for their proper interpretation.

24. Before we consider the provisions which have been made for giving complete immunity to the higher judiciary, we will at this stage refer to the settled legal position after examination of the provisions in chapter VI entitled "subordinate Courts" occurring immediately after chapter V which deals with the High Courts making special provision for judicial services of the state. Chapter VI has Six Articles, 233 to 237 and the two material Articles, 233 and 235 are as under:

> 232. (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.
> 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 authorizing the High Court to deal with him otherwise than in accordance the with conditions of his service prescribed under such law.
> Article 236 defines the expression "District Judge" as including a wide variety of judicial officers therein mentioned.

25. The entire history of these provisions was examined in *State of West Bengal v. Nripendra Nath Bagchhi*[14]*,* with a view to bringing into bold relief the necessity of enacting part VI even though special provision was made in part XIV with regard to services under the union and states. The position under the Government of India Act, 1935 was first pointed out to show how the independence of the subordinate judicial service and of the District Judges was thus assured to a certain extent but not absolutely. When India attained independence and the constitution was drafted, the advance made by the 1935 Act was somehow lost sight of and no provision similar to those made in the Government of India Act, 1935 in respect of the subordinate judiciary found place in the

[14] AIR 1966 S.C. 447

draft constitution. This unfortunate omission, however, attracted timely attention and consequently Chapter VI was enacted as an independent chapter. That is why in the next decision in *Chandra Mohan v. State of Uttar Pradesh*[15] keeping in mind the aforesaid history behind the enactment of Articles 233 to 237 their lordships observed:

> The Indian constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the state; it constitutes a High Court for each state, prescribes the institutional conditions of service of the Judges thereof, confers extensive jurisdiction on it to issue writs to keep all Tribunals, including in appropriate cases the Governments, within bounds and gives to it the power of superintendence over all courts and tribunals in the territory over which it has jurisdiction. But the makers of the constitution also realised that 'it is the subordinate judiciary in India who are brought most closely into contract with the people, and it is no less important, perhaps indeed even more important, that their independence should be placed beyond question in the case of the superior Judges'. Presumably to secure the independence of the judiciary from the executive, the constitution introduced a group of articles in chapter vi of part vi under the heading 'subordinate Courts'. But at the time the constitution was made, in most of the states the magistracy was under the direct control of the executive. Indeed it is common knowledge that in pre-independence India there was a strong agitation that the judiciary should be separated from the executive and that agitation was based upon the assumption that unless they were separated, the independence of the judiciary at the lower levels would be a mockery. So Article 50 of the directive principles of policy states that the state shall take steps to separate the judiciary from the executive in the public services of the states. Simply stated, it means that there shall be a separate judicial service free from the executive control.
>
> Keeping in mind this historical background and the underlying constitutional policy of these provisions in chapter VI for subordinate judiciary, the legal position has now been well-settled in a series of decisions.

26. The scope and ambit of the power conferred upon the governor under Article 233 exercisable by him on the advice of the Council of ministers in consultation with the High Court is confined merely to the initial appointment or initial promotion of persons to be district Judges and to their assignment to a post in the said cadre and to the. Removal or dismissal of such persons. In other words, the power of the governor under the said article ceases after he has made the initial appointment or initial promotion and assignment to a post in the cadre and thereafter he comes into the picture again only in the case of dismissal or removal. Under Article 235, however, the High Court is made the sole custodian of control over the judiciary and, therefore, in the exercise of that exclusive control, no question arises even of any consultation with the governor. It is held to be the constitutional duty of the High Court to preserve and exercise the control so vested in it and any abdication of its functions even by way of vigilance inquiry by the executive would be an Act of self-abnegation on the part of the High Court in breach of the constitutional mandate. The scope and ambit of this control vested in the High Court under Article 235 is in the entire spectrum of administrative control and is not confined merely to administrative jurisdiction or to general superintendence or to arranging the day

[15] A.I.R. 1966 S.C. 1987

to day work of the court but it comprehends control over the conduct and discipline of District

Judges (*State of West Bengal v. Nripendra Nath Bagchi*[16], their further promotions and confirmations (*State of Assam v. Kuseswar*[17], and *Joginder Nath v. Union of India*[18]); their seniority disputes *State of Bihar v. Madan Mohan*[19], their transfers *State of Assam v. Ranga Muhammad*[20], the placing of their services at the disposal of the Government for an ex-cadre post *State of Orissa v. Sudhansu Sakhar Misra*[21], their fitness for being retained in service and recommending their discharge from service *Ram Gopal v. State of Madhya Pradesh A.I.R. 1970 S.C. 153* exercise of complete disciplinary jurisdiction over them including initiation of the inquiry *Punjab and Haryana High Court v. State of Haryana, AIR 1975 S.C. 613* and in the matter of premature retirement *State of Haryana v. lnder Prakash, AIR 1976 S.C. 1841*. In all these matters of control it is held that the governor would be Acting properly in following the High Court's recommendation. ***Shamsher Singh v. State of Punjab, AIR 1974 S.C. 2192***. This wide ambit of power conferred under Article 235 is held not to be curtailed even by the concluding portion of the said article except to the extent therein specified and even if some rule framed under Article 309 impinges upon the power of control, such rule is held to be ultra vires ***State of Assam v. S.N. Sen, AIR 1972 S.C. 1028 at 1030*** .

27. In ***Shamsher Singh v. State of Punjab A.I.R. 1974 S.C. 2193*** a decision of a Larger Bench of Seven Judges, the learned Chief Justice at page 2207 in terms held as under:

> It is indeed strange that the High Court which had control over the subordinate judiciary asked the Government to hold an enquiry through the vigilance department. The members of the subordinate judiciary are not only under the control of the High Court but are also under the care and custody of the High Court the High Court failed to discharge the duty of preserving its control. The request by the High Court to have the enquiry through the director of vigilance was an - Act of self-abnegation. The contention of the state that the High Court wanted the Government to be satisfied makes matters worse. The governor will Act on the recommendation of the High Court. That is the broad basis of Article 236. The High Court should have conducted the enquiry preferably through District Judges. The members of the subordinate judiciary look up to the High Court not only for discipline but also for dignity. The High Court Acted in total disregard of Article 235 by asking the Government to enquire through the director of vigilance.
>
> In the concurring judgment, His Lordship Iyer J., made the pertinent observation as under:
>
> The second spinal issue in the case, as earlier indicated, bears on fearless justice, another prominent creed of our constitution the independence of the judiciary is a fighting faith of our founding document. Since the days of lord coke, judicial independence from executive control has been accomplished in England. The framers of our constitution, impressed by this example, have fortified the cherished value of the rule of law by incorporating provisions to insulate the judicature. Justice becomes fair and free only if institutional immunity and autonomy are guaranteed (of course there are other dimensions to judicial independence which are important but irrelevant for the present discussion).

The

[16] AIR 1966 S.C. 447 [18] A.I.R. 1975 S.C. 514 [20] AIR 1967 S.C. 903
[17] AIR 1970 S.C. 1616 [19] AIR 1976 S.C. 404 [21] AIR 1968 S.C. 647

exclusion of executive interference with the subordinate judiciary, i.e., grass-roots justice, can prove a teasing illusion if the control over them is vested in two matters, viz., the High Court and the Government, the latter being otherwise stronger. Sometimes a transfer could be more harmful than punishment and disciplinary control by the High Court can also be stultified by an appellate jurisdiction being vested in Government over the High Court's administrative orders. This constitutional perspective informed the framers of our constitution when they enacted the relevant Articles 233 to 237. Any interpretation of administrative jurisdiction of the High Court over its subordinate limbs must be aglow with the thought that separation of the executive from the judiciary is a cardinal principle of our constitution. However, we do not pursue this question further since, in the present case, Government has agreed with and Acted on the High Court's 'recommendation' and, moreover, the methodology of conflict resolution, when the view of the High Court is unpalatable to the executive, fallsto be directly considered in a different set of pending appeals At page 2228, His Lordship lyer J., further referred to the decision in *Union of India v. Joyti Prakash Miller*[22], where in the context of a High Court Judge's determination of age the view ad been taken by six Judges that the decision about the age of the High Court Judge is of the president himself and not of the Prime Minister or the home Minister, but in the light of the scheme as propounded by this larger bench on the doctrine of cabinet responsibility, the decision was doubted whether such an interpellation as to the personal satisfaction of the president was correct. Still his lordship observed--

"We are of the view that the president means, for all practical purposes, the Minister or the council of ministers as the case may be, and his opinion, satisfaction or decision is constitutionally secured when his ministers arrive at such opinion satisfaction or decision. The independence of the judiciary, which is a cardinal principle of the constitution and has been relied on to justify the deviation, is guarded by the relevant article making consultation with the Chief Justice of India obligatory. In all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India and the court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order. In this view it is immaterial whether the president or the Prime Minister or the Minister of justice formally decides the issue."

28. That is why in *The State of Haryana v. Inder prakash*[23], when the concerned District Judge was compulsorily retired, it was in terms held by the learned Chief Justice at pages 1844-1845 that-

> Administrative, judicial and disciplinary control over members of the judicial service is vested solely in the High Court. Premature retirement is made in the exercise of administrative and disciplinary jurisdiction. It is administrative because

[22] AIR 1971 SC 1093

[23] A.I.R. 1976 S.C. 1841

> it is decided in the public interest to retire him pre-maturely. It is disciplinary
> because the decision was taken that he does not deserve to continue in service up to the normal age of superannuation and that it is in the public interest to do so... the vesting of complete control over the subordinate judiciary in the High Court leads to this that the decision of the High Court in matters within its jurisdiction will bind the state.
> and in that context the earlier observation in Shamsher Singh's case was relied upon where it was in terms held that the Government would Act on the recommendation of the High Court as that was the broad basis of Article 335. It is only when after the conclusion of the inquiry initiated by the High Court, the order of removal or reduction is sought to be passed, that it is held in *Baradakanta Mishra v. Orissa High Court*[24], that the actual reduction in rank and dismissal on completion of the inquiry initiated by the High Court is to be done by the appointing authority, that is to say, the governor, and that power could not be exercised by the High Court.

29. The entire review of the catena of cases shows how the scheme of Chapter VI has been interpreted to ensure complete judicial independence so far as the subordinate judiciary is concerned by vesting complete control in the High Court under Article 236 once the initial appointment is made and then again the power of the governor comes back at the time of the passing of the final order of removal or dismissal. But in between, the entire spectrum of control is with the High Court and even as regards the final orders after the conclusion of the disciplinary inquiry, the broad basis of this control is stated to be that the governor will Act on the advice of the High Court in such administrative and disciplinary control matters. Even as regards the transfer of the subordinate judiciary, in *State of Assam v. Ranga Muhammad*, the entire history of these Articles 233 to 237 as set out in bagchi's case was referred to and the term "posting" in Article 233(1) was given the narrower of the two possible meanings and it was held that "posting" did not include transfer, but only initial appointment or initial promotion and, therefore, the power to transfer after the initial appointment or initial promotion as a District Judge rested with the High Court without any consultation with the governor. As to this relevant aspect of transfer, his lordship Hidayatullah J., said-

> 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 prossess 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 the 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

[24] A.I.R. 1976 S.C. 1899

personal information, deal with the matter, then 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 combines 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 is 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,

We should also bear in mind the observation already referred to by His Lordship Iyer J., in *Shamsher Singh v. State of Punjab*[25], he in terms observed while referring to the exclusion of executive interference with the subordinate judiciary that--

Grass-roots justice would prove a teasing illusion if the control over them is vested in two masters, viz., the High Court and the Government, the latter being otherwise stronger

And pithily added that "sometimes a transfer could be more harmful than punishment". If in the light of this carefully evolved elaborate scheme of subordinate judiciary in chapter vi for the sole object of maintaining judicial independence for implementing the directive principles is kept in mind, there could be no doubt that the same is the propelling thrust of the provisions for the higher judiciary.

30. Before we refer to the special provisions regarding the higher judiciary, an important difference has been rightly emphasized by Mr. Seervai in the position of the member of the judicial service, whether the superior judiciary or the subordinate judiciary, and the position of the members of the civil service or other services of the crown because Judges of the High Court and members of the judicial service are not Government servants in the sense in which the members of the civil service are Government servants a servant is always bound to carry out the lawful directions or orders of the master and would be liable to be dismissed for wilful disobedience. But so far as the judiciary is concerned, there can be no interference by issuing any orders to the Judges in the course of discharge of their judicial duties as in fact any such order would amount to a contempt of Court. This vital distinction is further augmented in the case of higher judiciary to secure its complete independence by changing the ordinary pleasure tenure of other Government servants and the members of lower judiciary to a fixed tenure under Article 310 up to the age of retirement, namely, sixty two years of age.

31. The important constitutional safeguards for the higher judiciary are-

(1) The tenure of the High Court Judge under Article 217 is that he shall hold office until he attains the age of sixty-two years.

Provided that:

(a) a Judge may, by writing under his hand addressed to the president, resign his office;

(b) a Judge may be removed from his office by the president in the manner provided in Clause (4) of Article 124 for the removal of a Judge of the Supreme Court;

[25] AIR 1974 S.C. 2192

(c) the office of a Judge shall be vacated by his being appointed by the president to be a Judge of the suprenls court or by his being transferred by the president to any other High Court within the territory of India.

Therefore, the Judge continues in his office for the full tenufe, unless he resigns his office voluntaryly or he is removed by the special procedure of impeachment under Article 124(4) after an address by each house of parliament sunported by a majority of the total membership of that house and by a majority of not less than two-thirds of the members of that house present and voting had been presented to the president in the same session for such removal on the ground of proved misbehavior or incapacity. Under Article 124(5), even the procedure which is evolved for presenting such an address and for investigation and proof of the misbehavior or incapacity of a Judge is a complete judicial procedure.

(2) The salaries payable to the High Court Judges are fixed by the constitution under Article 221 as specified in the second schedule and under Article 221(2), every Judge is entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by parliament and, until so determined, to such allowances and rights as are specified in the second schedule. The proviso places a restriction that neither the allowances of a High Court Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

(3) The salaries and allowances of the High Court judges are charged on the consolidated fund under Article 202(3)(d) and because of Article 203, such sums charged upon the consolidated fund even are not subject to the vote of the Legislative Assembly.

(4) As earlier pointed out, even though the allowances and rights in respect of leave of absence and pension may be fixed by parliament, Article 221(2) has provided that neither the allowances of a Judge nor his rights in respect of leave shall be varied to his disadvantage after his appointment by enacting a clear protective safeguard in that behalf.

(5) Article 211 provides that no discussion shall take place in the legislature of a state with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties.

These provisions secure the independence of the judiciary from legislative interference as well as from interference by members of the legislature. Further, as executive power of the state is co-extensive with its legislative power, automatically, executive interference with the independence of the judiciary is also excluded.

(6) Having thus protected judicial independence from the legislature and the executive control, Article 215 confers on the High Court the power to commit for contempt, thus protecting the administration of justice and the authority of a Judge from being in-ferfered with or assailed by scandalous or scurrilous attacks against High Court Judges. This protection of the judiciary by vesting the contempt power in the High Court is for securing public confidence in the integrity and the competence of the Judges, so that they could freely and fearlessly discharge their duties. In that context the general law provision conferring absolute immunity on a judge for anything said or done in the discharge of his judicial duty should be borna in mind which secures free and fearless discharge by a Judge of his duties.

(7) The independence of the High Court judges is further emphasized by Article 229 which vests the power of appointment of officers and servants of the High Court in the Chief Justice and finally, Article 50 gives expression of the same principle in the directive mandate by directing the state to take steps to separate the judiciary from the executive in the public services of the state.

32. All these provisions have been rightly stated by Mr. Seervai to have been designed to remove all control, legislative, political and executive on the superior judiciary, namely, the High Court, so that the Judges of the High Court can discharge their duty according to the oath of office which they took, namely, to administer justice without fear or favor, without affection or ill will. If the tenure were at pleasure, then as the constitutional history of England before the Act of settlement shows, justice could not be administered without fear or favor when administration of justice conflicted with the interest of the sovereign who had the power to dismiss Judges, a power which was freely exercised. It was to avoid this evil that our freedom fighters when they enacted the constitution of this free nation set down the direction of its change or growth as laid down in the aforesaid directive principles where a social order was to be evolved in which justice, social, economic and political would inform all the institutions of national life achieving full separation under Article 50 of judiciary from the executive in the public services of the state so that the cherished values enshrined in the preamble could be realised, and this whole thrust of our constitutional scheme in this relevant social and historical background would have to be borne in mind for a true interpretation of these relevant provisions in Article 222(1) as it would furnish evidence about the historical and social background.

(B) Legislative History of this provision and the light thrown from other provisions, if any.

33. Before we come to the relevant provisions Article 222(1), a small historical perspective in which this provision was drafted would be relevant, in the draft constitution, Sub-clause (c) of the proviso to draft Article 193(1) contained the same provision as is contained in Article 217(1)(c),

"(c) The office of the Judge shall be vacated by his being appointed by the president to be

a judge of the Supreme Court or by his being transferred by the president to any other High Court within the territory of India."

With the difference that in place of the word "transferred", the word "appointed" was used. Besides, the draft constitution did not contain any provision expressly to transfer Judges contained in Article 222(1). The drafting committee added this Article 222 to enable the President to transfer a judge from one High Court to any other High Court. The provision at the draft stage by using the term "appointed" was as per the previous practice under the Government of India Act, 1935. The term "appointed" in Article 217(1)(c) has been now in the final form clearly and correctly substituted by "transferred" and the specific provision in Article 222(1) has been enacted. It is true however that in the Second Schedule, Part B, regarding "provisions as to the Judges of the Supreme Court and of the High Courts" in Clause 11(b), the term "Actual service" is defined as including unless the context otherwise requires-

(i) time spent by a Judge on duty as a Judge or in the performance of such other functions as he may at the request of the president undertake to discharge;

(ii) vacations, excluding any time during which the Judge is absent on leave; and

(iii) joining time on transfer from a High Court to the Supreme Court or from one High Court to another.

Therefore, even in the context of the Supreme Court under the term "Actual service" the term "joining time on transfer from a High Court to the Supreme Court" has been used without making any distinction between transfer and appointment. While understanding the impact of these other provisions, we must bear in mind the provisions in Articles 127, 128 and 224A as well which have been so vehemently relied upon by Mr. Raman.

34. Under Article 127(1) it is because of the want of quorum of the Supreme Court that the Chief Justice of India is empowered, with the previous consent of the president and after consultation with the Chief Justice of the High Court, to designate a Judge of a High Court duly qualified for appointment as a Judge of the Supreme Court as an ad hoc Judge, for the necessary period to tide over this difficulty because there is no quorum of the Judges of the Supreme Court available to hold or continue the session of the Court. In that context Article 127(2) says that it shall be the duty of the Judge so designated, in priority to other duties of his office, to attend the sittings of the Supreme Court at the time and for the period for which his attendance is required, and while so attending, he shall have all the jurisdiction, powers and privileges, and shall discharge the duties, of a Judge of the Supreme Court. Article 127, however, shows that the judge who is so designated by the Chief Justice after the previous consent of the president, has to discharge this additional duty while holding his office as the High Court Judge by giving priority to other duties of his office to attend these Supreme Court sittings on his designation as an ad hoc Judge and he is to be requested for that purpose by the Chief Justice of India after consultation with the Chief Justice of the High Court concerned. So far as Article 128 is concerned, it contemplates the attendance of retired Judges at sittings of the Supreme Court and that is why the non-obstante clause is used at the opening of that article and such a retired Judge of the Supreme Court or of

the federal court or who has held the office of a judge of a High Court and is duly qualified for appointment as a Judge of the Supreme Court is not to be deemed to be a judge of the Supreme Court but he has only to sit and Act as a Judge of the Supreme Court when requested by the Chief Justice of India with the previous consent of the president and he is entitled to allowances determined by the president and to have all the jurisdiction, powers and privileges of the Supreme Court Judge although not deemed to be a Judge for other purposes. It is this article which contains a proviso that nothing in the article shall be deemed to require any such person as aforesaid to sit and Act as a Judge of that court unless he consents so to do. A similar provision corresponding to Article 128 is to be found in Article 224 a where the appointment of retired Judges can be done by the Chief Justice of the High Court with the previous consent of the president. There also non-obstante clause is used because it is requesting the retired person for the limited purpose of sitting and Acting at the sittings of the High Courts and for other purposes he is not to be deemed to be a Judge of that High Court but there also the provision says that nothing in the article shall be deemed to require any such person as aforesaid to sit and Act as a Judge of the High Court unless he consents so to do. The very context of these provisions in Article 224-A and Article 128 shows that the proviso is only by way of abundant caution to set at rest any doubts because otherwise also it is implicit in such a request to a person who has retired and who notwithstanding anything in this chapter in requested to sit being entitled to the limited allowances determined by the president. Such provision was not necessary to be made in the context of Article 127 but there also the context is of an ad hoc Judge's appointment to be performed by the Chief Justice of India by designating the person by making a request to him to attend the sittings of the Supreme Court because of the want of quorum and that is why the person designated as a judge has thereafter to attend the sittings in priority to the other duties of his office as a High Court Judge. Therefore, even though the "Actual service" in paragraph 11 of Second Schedule, Part D, may include joining time on transfer, in the sense even of appointment, from a High Court to the Supreme Court or from one High Court to another, the special context of all these relevant provisions is such that these provisions could afford no clue or guidance as to the true interpretation of the provision in Article 222(1) for resolving the present controversy. Once the proviso in Article 224-A has been held to be by way of abundant caution in the peculiar context of those retired Judges, it could never throw any light by way of clue to construction of the relevant Article 222(1) as per the settled legal position and so no implication can be derived by analogy from such provisos as to the true scope of Article 222(1).

(C) Construction of Article 222(1).

35. Coming to the construction of this crucial provision in Article 222, it is clearly a provision of a constitutional power which is in clear, categorical and unambiguous language. The constitution makers have not only specified the authority for transfer of these persons of high judiciary, namely, the highest head, the president, but even the independent fetter on the exercise of this power by the executive has been provided by requiring it to be exercised only after consultation with the Chief Justice of India. Therefore, this is a constitutional provision where the express

power of transfer of a Judge from one High Court to another High Court has been also clearly fettered by a categorical limitation of consultation with the independent Chief Justice of India, the highest judicial head, in view of the importance of this high office and because of the thrust of the entire objective underlying the enactment of Chapter V. The provision forms a necessary link in the entire set up of the High Courts and when the words are clear and unambiguous, this express constitutional power which is fettered by its own express limitations could not be on settled canons of construction whittled down by implications, unless the context would be compelling or when the language is shown to be ambiguous or of doubtful import. As pithily expressed in lord Reid's speech in *Westminster Bank Ltd. v. Zang*[26]

> "But no principle of interpretation of statutes is more firmly settled than the rule that the court must deduce the intention of parliament from the words used in the Act. If those words are in any way ambiguous - if they are reasonably capable of more than one meaning - or if the provision in question is contradicted by or is incompatible with any other provision in the Act, then the court may depart from the natural meaning of the words in question. But beyond that we cannot go."
>
> The settled rules of interpretation would therefore never permit addition of words unless the provision of this constitutional power is meaningless or of doubtful meaning, neither of which it prima facie is. The suggested addition would, in our

[26](1966) A.C. 182

> view, make the language used unhappy and would further effect a complete change in the meaning of the words used therein if the power of transfer is made to rest on the consent of the transferred judge. The golden rule of construction which is pressed in aid could never permit when the language of a constitutional provision is so clear and unambiguous to legitimately add any words thereto which might be said to carry out the supposed intention of the Constitution makers. The intention of the constitution makers would have to be gathered only from the words used by them and no such liberty can be taken by the Courts for effectuating a supposed intention of the legislature. To harmonise is not to destroy and if a power of transfer is sought to be read as a transfer with consent, the power ceases to be a power at all. Even when the highest head of the country and the highest head of the judiciary agree that the public interest requires the transfer of a judge from one High Court to another High Court, if in this express provision, we were to make any such implication as suggested by Mr. Seervai, the power would be defeated. Mr. Seervai's only answer was that we must bear in mind the high offices which are in the picture and when a transfer is in the public interest and is agreed upon both by the president and the Chief Justice of India, the concerned judge would always be a willing Judge and exception could not be taken as a rule for putting a construction which would seriously endanger the freedom of the judiciary.

36. That is why Mr. Seervai vehemently relied upon the precedents especially in *B.M.D.*

Chamarbaugwalla v. Union of India[27], and *Shamsher Singh v. State of Punjab*[28], and the usual precedent of implying even in absence of Article 12, the power of judicial review in our constitution. It is true that in Chamarbaugwalla's case at page 631. Their lordships had in terms pointed out that the literal construction had, in general, but prima facie preference and to arrive at the real meaning it was always necessary to get an exact conception of the aim, scope and object of the whole Act; to consider according to Heydon's case, 76 E.R. 637 (A-1); (1) what was the law before the Act was passed; (2) what was the mischief or defect for which the law had not provided; (3) what remedy parliament has appointed; and (4) the reason of the remedy. It was observed that to decide the true scope of the Act, regard must be had to all such factors as can legitimately be taken into account in ascertaining the intention of the legislature, such as the history of the legislation and the purposes thereof, the mischief which it intended to suppress and the other provisions of the statute, and construe the language of Section 2(d) in the light of the indications furnished by them. This approach was taken by their lordships with reference to the term "prize competitions" in Section 2(d) of the Prize Competitions Act, 1955 which was a wide and unqualified definition. It is true that this clear and unambiguous language was curtailed by an implied limitation which necessarily flowed from this regulatory measure itself. It was on the compulsive thrust of the very nature of this regulatory measure that the prize competition was interpreted by restricting the term to competitions in which success did not depend to any substantial extent on skill because it was an Act enacted under Article 252(1) to control and regulate prize competitions of a gambling character. The same was the approach in Shamsher Singh's case in making implications in exceptional cases where the provision about the governor

[27] A.I.R. 1957 S.C. 628

[28] A.I.R. 1974 S.C. 2192

Acting on cabinet advice would become meaningless. Even the ultra vires doctrine has been implied by way of necessary implication as being clearly implicit in such a written constitution putting fetters on the executive and the Legislature.

37. This settled principle has been reiterated in *M. Pentiah v. Veeramallappa*[29], by His Lordship Sarkar J., at page 1115 in the following words:

> Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence.... Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskillfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. Nevertheless, the courts are very reluctant to substitute words in a statute, or to add words to, it, and it has been said that they will only do so where there is a repugnancy to good sense." See Maxwell on Statutes (10th Ed.) P. 229.
>
> In *Seaford Court Estates Ltd. v. Asher*[30] Denning L.J. said,

> When a defect appears a Judge cannot simply fold is hands and blame the draft-man. He must set to work on the constructive task of finding the intention of Parliament and then he must supplement the written word so as to give 'force and life' to the intention of the legislature.... A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases." This passage is also approved in *State of Bihar v. A.K. Mukherjee*[31],
>
> That is why at page 1113 their lordships in terms took the view as per the settled principles of construction that when a statute confers an express power, a power inconsistent with that expressly given could not be implied. Therefore, the aforesaid settled principle of construction would come into play when a purposive interpretation would have preference over the literal interpretation as the language in its ordinary grammatical meaning would lead to a manifest contradiction of the particular enactment. Here the implication which is sought to be made by adding words "with consent" would really contradict the very grant of the power. Authoritative power and its exercise by consent only are a contradiction in terms.

38. Even in *Collector of Customs v. D.S. & W. Mills Ltd*[32]*.,* the two well-established rules of construction are reiterated, namely; (1) where the words of a statute are in themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature; and (2) where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce

[29] A.I.R. 1961 S.C. 1107
[30] 1949-2 All E.R. 155 at p. 164
[31] A.I.R. 1975 S.C. 192
[32] A.I.R. 1961 S.C. 1549

uncertainty, friction or confusion into the working of the system. Even on the second principle it is only when this constitutional provision is said to be ambiguous or of doubtful import that we would have to construe it as per the underlying objective so that the mischief sought to be remedied by securing judicial independence in this host of provisions of Constitution would be suppressed and the remedy of providing an independent High Court would be advanced. More so, this would be the reason when before these superior courts the state or the union is an important litigant and, therefore, looking to the nature of this power involving such grave consequences on a Judge holding such high office, it could not be exclusively vested in the executive head, the president, to be exercised on the aid and advice of the ministers. But such an alternative construction question would arise if the term "transfer" is said to be ambiguous and if the framers of the constitution had not provided an independent fetter in the form of consultation of the highest judicial head the Chief Justice. The consultation has been interpreted, in the cognate provisions in Article 233 in respect of the appointment of district judges and in Article

217(3) about the determination of the age of the High Court Judge, as we shall presently show while dealing with the last question, to be a substantial consultation and not a mere empty formality. The Chief Justice of India being the judicial head could be expected to keep the scales even and would be competent to give fair and just advice and, therefore, it could never be said that this provision in Article 222 leaves unfettered power to the executive to transfer the judge so as to attract the compulsive context plea of the cardinal purpose of securing independent judiciary being frustrated in the absence of any such necessary limitation being read. As lord denning rightly put it, the jurisdiction of the Court is interstitial in the sense that the courts do not make law but they declare the law and, therefore, what was necessarily implicit could only be unravelled by stating it in express words. Therefore, any necessary implication has to flow from the term "transfer" and such an inconsistent or repugnant implication of transfer with consent could never flow if transfer is obviously in the sense of authoritative transfer.

39. Mr. Raman in this connection vehemently relied upon the decision in ***S.*** *Narayanaswami v. G. Panneerseham,*[33] where the settled rule of construction was pointed out that courts may depart from the literal rule only to avoid a patent absurdity. No doubt it is the duty of the court to try and harmonies the various provisions of an Act passed by the legislature. But it is certainly not the duty of the court to stretch the words used by the legislature to fill in gaps or omissions in the provisions of an Act. The said principle of statutory construction was referred to as: here the statute's meaning is clear and explicit, words cannot be interpolated. In the first place, in such a case, they are not needed. If they should be interpolated, the statute would more than likely fail to express the legislative intent, as the thought intended to be conveyed, might be altered by the addition of new words. They should not be interpolated even though the remedy of the statute would thereby be advanced, or a more desirable or just result would occur. Even where the meaning of the statute is clear and sensible, either with or without the omitted words, interpolation is improper, since the primary source of the legislative intent is in the language of the statute.

Therefore, on the supposed scheme of functional representation underlying Article

[33] A.I.R. 1972 S.C. 2284

171 of the constitution, their lordships refused to add an implied qualification of being a graduate, on a representative of the graduates' constituency which the constitution-makers or, in any event, the Parliament could have easily imposed, and it was held that would be invading the legislative sphere, and the defect could be removed only by law made by parliament. Therefore, on settled principles this provision in Article 222 must be understood in plain grammatical sense without any such implied limitations suggested by Mr. Seervai. In absence of any compulsive context, and as ours is an elaborate constitution and not a short constitution and particularly as the framers of the constitution have deliberately provided for this power of transfer of a judge from one High Court to another High Court being exercised after constitutional safeguard provided therein of independent effective consultation with the Chief Justice of India, there would be no room

for any such implication which would defeat this power as it would be clearly rewriting the constitution contrary to ail canons of Construction.

40. Therefore, even when Mr. Seervai has led us to consider all the relevant materials of avenues of approach by considering the historical and social background, the thrust of the objective of securing judicial independence, the entire setting and context of all these relevant provisions and all the other provisions which can throw light on this subject matter, we are not convinced that for construction of Article 222(1) we can add words "with consent" on the settled principles of construction.

41. Mr. Seervai next relied on the ambiguity in the term "transfer" because it was capable of various shades of meaning according to him like: (1) penal transfer; (2) transfer by way of administrative routine; (3) transfer in the sense of fresh appointment to another High Court; (4) voluntary transfer; and (5) compulsory transfer; and he, therefore, argued that such a construction must be placed which would not defeat the cardinal purpose of this provision nor ignore the very thrust of our constitutional scheme and purpose, by perpetuating the mischief which was intended to be remedied. A word may be capable of different meanings in different contexts but that does not make it ambiguous because only that meaning is to be adopted which it bears in the context of the particular enactment. The ambiguity implies that the word in the same context bears two meanings or two senses and so a construction problem arises because the word is of doubtful import and a wider or narrower sense of the word would have to be preferred to advance the salutary purpose and suppress the mischief as intended by the legislature. *Vide Kanai Lal v. Paramnidhi*[34]*,* Even such ambiguity has to be a patent ambiguity as flowing directly from the term used and not any then or hypothetical imagined ambiguity. The provision being of a power of transfer by creating the authority, prescribing the fetter on that authority of an independent consultation and prescribing the two places from and to which such transfer could take place, the provision is obviously of an authoritative transfer and it in its plain context negatives the construction of a voluntary transfer. Even the intrinsic evidence in Article 222(2) is too eloquent that this is an authoritative provision of transfer for which the framers of the constitution envisaged a compensatory allowance, which could only be for the injury inflicted by exercise of this high power. When the power is exercised by consent, there cannot arise arty question of paying any compensatory allowance, it is true, however, that the term "transfer" would confer very unfettered power if this consultation of the Chief Justice of India were not provided. But as per the settled

[34] A.I.R. 1957 S.C. 907 (910)

legal position that consultation serves the very purpose of securing judicial independence because it is the third party whose advice is to have such great binding weight and, therefore, the transfer function is not made dependent exclusively on the executive control. Therefore, only a narrow meaning has to be given to the term "transfer" in the compelling context of this high power which is vested in high authorities and which is to be exercised against such high office at the particular place of appointment as per the oath prescribed, with such attendant serious

consequences of private and public injuries and in particular, the most important prejudicial consequence envisaged in Article 220 on the right of practice being restricted of such a transferred Judge. Article 220 provides as under:

> 220. No person who, after the commencement of this constitution, has held office as a permanent judge of a High Court shall plead or Act in any court before any authority in India except the Supreme Court and the other High Courts.
> Therefore, once a Judge is transferred from one High Court to another High Court, he alone suffers from this further incapacity by restriction on his right to practice even in the transferee High Court as well.

42. It is this very context of this high power which clearly excludes the connotation of any penal transfer and Mr. Raman rightly did not suggest any such ambit of this power. Even no authority is constituted for any disciplinary control over the High Court by the constitution as in the case of subordinate judiciary where-complete administrative and disciplinary control is vested in the High Court as earlier pointed out. Therefore, the thrust of these provisions earlier mentioned and the objective to be attained of securing judicial independence would materially point to the necessary construction that the transfer is not in the sense of a penal transfer. Even the transfer as an administrative routine function could never be the meaning in this context because this is not an ordinary relation of master and servant with any administrative head over the Judges, and the tenure is not even a pleasure tenure but a tenure for a fixed term. In such a context when the transfer involves serious consequences, it is not by way of an administrative routine but it is implicit in the very nature of this high sensitive power that it must be in the public interest for serving the. Highest public good and not for any private purpose of any high placed Minister or even the head of the executive.

43. Finally Mr. Seervai vehemently argued that the provision in Article 217(1)(c) and the fact that under Article 219 the person would have to take a fresh oath of office at the other High Court would show that transfer is used in the sense of appointment. For this compulsive context he relied on the fact of coupling together for the purpose of vacation of office of a High Court Judge the fact of his being appointed by the president to be a Judge of the Supreme Court as well as his transfer by the President to any other High Court. Both the words "appointment" to the Supreme Court and "transferred" having been used in Article 217(1)(c) and as Article 222(1) was introduced after amending the draft constitution at the final stage, Mr. Seervai argued that it was only clarifying and making explicit what was always implicit even if the word "appointed" was used as per the draft clause corresponding to Article 217(1)(c) and which was the prevailing position under the Government of India Act. It is in that context that Clause 11 in part d second schedule was sought to be marshaled in aid where the term "transfer" is used even in the context of appointment to the Supreme Court as well as in the context of "transfer" to the other High Court for the purpose of defining "Actual service". The light thrown from these surrounding provisions is too feeble a light to narrow down the scope of this constitutional power by holding

that this transfer being in the sense of mere appointment to another High Court and being an appointment by transfer, it should always be with consent the assumption made is that a High Court judge would not be appointed as Supreme Court judge without his consent and, therefore, consent was implicit even in transfer. Such a construction from the surrounding provisions, as earlier pointed out, would defeat this very power of transfer and we cannot adopt that construction. Therefore, although "transfer" in the sense of involving fresh appointment is clearly implicit in this context by appointment to another High Court, the only meaning which Article 222(1) necessarily envisages is the power of transfer simpliciter resulting in appointment in another High Court, which must be exercised looking to the scope of this high power by these high authorities against persons occupying such high office and which should necessarily be in public interest and not for a private or collateral purpose. In fact the whole attempt of the Union of India is to justify the exercise of this power on the ground of wider public interest of national integration and that is why all these 25 years this guideline or principle was adopted of transfer by consent so that the transfer power inflicted no injury. Mr. Seervai rightly did not press in aid this convention or practice for the purpose of construction because a policy could not fetter constitutional power for all time to come.

44. Finally, Mr. Seervai mentioned the merits of his construction which promotes (1) the underlying purpose of securing the judicial independence; (2) simplifies the judicial task as the transfer power being exercised by consent there would be no question of it being challenged; (3) advances the purpose of achieving public interest by willing co-operation as without the heart and soul in the task of national integration the whole public interest would be defeated and that was the very basis in the policy statement of Mr. A.K. Sen to persuade the Judges so that the national integration would be achieved; and (4) judicial preference must be for what is regarded as sounder principle as between two competing principles, especially when this principle had held the field for last twenty five years. On these grounds which at first blush were very attractive, Mr. Seervai could not convince us to imply these words against all settled principles of construction and we must, therefore, reject the first contention of Mr. Seervai.

45. As regards the second contention, Mr. Seervai's argument has hardly any substance. The reliance on the doctrine of promissory estoppel is completely misplaced if the statement of Mr. A.K. Sen, the then law Minister, is read in its true context and background. This statement was not being announced for inviting advocates to join the judiciary but its whole context and setting was to make a statement before the house while speaking on the Constitution Fifteenth Amendment Act, 1963 when this compensation provision in Article 222(2) was reintroduced after its earlier deletion by the Seventh Amendment. It is true he had stated that they had accepted it as a principle that so far as High Court Judges were concerned, they should not be transferred excepting by consent. This convention had worked without fail during the last twelve years and all transfers had been made not only with the consent of the transferee, but also in consultation with the Chief Justice of India. The further paragraph which is relied upon is very eloquent:

As I said, though the power of the president to transfer a judge from one High Court to another was unfettered, by convention we have never transferred a judge without his consent, which explains a good deal the restraint with which these powers have been exercised, and completely negatives the unfounded charge that we have tried more or less to interfere with the judiciary, a charge which is so frequently and freely canvassed by persons who are possibly either ignorant of facts or do not like to know the facts.

This statement itself makes it clear that the law Minister was affirming the unfettered power of the transfer of a Judge from one High Court to another and was referring to the convention only to refute the charge which was freely canvassed by persons who were possibly either ignorant of facts or did not like to know the facts, to the effect that they were trying to interfere with the judiciary. That is why he mentioned that even though the power was unfettered, they had never transferred a judge without his consent, which explained a good deal the restraint with which those powers had been exercised, and completely negatived this charge of interference with the judiciary. The statement was made on the floor of the house to refute a charge of persons who were ignorant or who did not like to know the true facts. It was made by a responsible Minister reiterating the unfettered nature of the power of transfer, and still emphasising the restraint with which it was exercised only to completely negative the unfounded charge, and could never be read as an assurance given to an able lawyer like the petitioner to ever Act to join the judiciary. The petitioner was conscious of this constitutional power and even though he may not have at the time of his moving the resolution in 1967 conference completely understood all the legal implications after being properly apprised, the fact remains that in the face of this constitutional power no question arose of any assurance or a promise being given to the advocates to induce them to join judiciary merely from this reply of the law Minister while refuting the aforesaid charge. In realised, and this whole telied upon by Mr. Raman in *Excise Commissioner v. Ram Kumar*[35], holding that there could be no such promissory estoppel so as to make the Government a slave of its policy for all times to come when the Government Acted in its Governmental, public or sovereign capacity would be applicable to the facts of the present case because this was a case of a mere policy statement and not of any assurance whatsoever. This decision also proceeds on the basis of the decision of the bench of five Judges in *N. Ramanatha v. State of Kerala*[36] and would be clearly binding on us. Mr. Seervai, however, wanted to rely on the catena of decisions on promissory estoppel in *Century Spg. & Mfg. Co. v. Ulhas-Nagar Municipality*[37], *Municipality and Turner Morrison and Co. Ltd. v. N.I. Trust Ltd*[38]., and he wanted to urge that those decisions being not referred to in this latest decision, the latest decision was per incuriam or that the ratio was merely obiter and not having the effect of a binding ratio. Mr. Seervai had only indicated these questions to be raised before the Supreme Court but so far as this Court is concerned, this settled legal position is clearly binding on us, especially when on the facts of this case there was no foundation or basis even laid, for invoking this doctrine. Therefore, the second contention also fails.

[35](1976) (3) S.C.C. 540
[36] A.I.R. 1976 S.C. 2641
[37] A.I.R. 1971 S.C. 1021
[38] A.I.R. 1972 S.C. 1311

46. As regards the last contention, Mr. Seervai rightly pointed out that so far as the aspect of consultation is concerned, the legal position in this context has been well-settled. In *Chandramouleshwar v. Patna High Court*[39], this question of consultation under Article 233 of the constitution had been considered because the appointment of a person to be District Judge rested with the governor and he could not make the appointment on his own initiative but had to do so in consultation with the High Court. At page 374 their lordships pointed out the entire underlying idea of Article 233 that the governor should make up his mind only after there had been a deliberation with the High Court, and emphasized what the article really required-

> 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.
>
> Their lordships perused the entire correspondence and pointed out that consultation with the High Court under Article 233 was not an empty formality. So far as promotion of officers to the cadre of District Judges was concerned the High Court was best fitted to adjudge the claims and merits of persons to be considered for promotion. The governor could not discharge his function under Article 233 if he made an appointment of a person without ascertaining the High Court's views in regard thereto. When it was contended on behalf of the State that the materials before the court amply demonstrated that there had been consultation with the High Court, as the High Court had given the views in the matter and the Government had been posted with all the facts, their lordships refused to accept this and lade the, following pertinent observations-
>
> 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 proposed the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation.
>
> Therefore, the notification was held to be not in compliance with Article 233 of the constitution and in the absence of this requisite consultation the notification promoting the District Judge was quashed.

47. Even in the context of the other similar Article 217(3) which provides :

> If any question arises as to the age of a judge of a High Court, the question shall be decided by the president after consultation with the Chief Justice of India and the decision of the president shall be final.

The question of consultation had to be interpreted in *Union of India v. Jyoti Prakash*[40], it was first pointed out that normally judicial power must be exercised

[39] A.I.R. 1970 S.C. 370

[40] A.I.R. 1971 S.C. 1093

by the authority in whom that power is vested but under

Article 217(3) power to decide the question as to the age of a Judge of the High Court had to be exercised after consultation with the Chief Justice of India. At page 1102 it was pointed out that-Consultation contemplated by the constitution is not a dialogue. Under Article 217(3) the president is required to consult the Chief Justice of India before determining the question as to the age of a Judge of the High Court. The president must before deciding the age of a judge under Article 217(3) obtain the advice of the Chief Justice of India. For obtaining that advice the president undoubtedly must make available all the evidence in his position to the Chief Justice of India. The Chief Justice has to submit his advice to the president on that evidence. It is not a condition of the validity of the decision by the president that the president and the Chief Justice should meet and discuss across a table the pros and cons of the proposed Action, or the value to be attached to any piece of evidence laid before the president and made available to the Chief Justice.

Therefore, the procedure which had been followed was held to be meeting with the mandatory requirement of consultation. Finally, at page 1106 it was also found that the Chief Justice of India while tendering the advice was not influenced by any extraneous consideration. It was pointed out as under:

It is necessary to observe that the president in whose name all executive functions of the union are performed is by Article 217(3) invested with judicial power of great significance which has bearing on the independence of the judges of the higher Courts. The president is by Article 74 of the constitution the constitutional head who Acts on the advice of the council of ministers in the exercise of his functions. Having regard to the very grave consequences resulting from even the initiation of an enquiry relating to the age of a judge, our constitution makers have thought it necessary to invest the power is the president. In the exercise of this power if democratic institutions are to take root in our country, even he slightest suspicion or appearance of misuse of that power should be avoided. otherwise independence of the judiciary is likely to be gravely imperilled. We recommend that even in the matter of serving notice and making for representation from a judge of the High Court where a question as to his age is raised the president s secretariat should ordinarily be the channel, that the president should have consultation with the Chief Justice of India as required by the constitution and that there must be no interposition of any other body or authority in the consultation between the president and the Chief Justice of India.

It is true that the view also had been taken in that decision that the president Acting under Article 217(3) performed a judicial function of grave importance under the scheme of our

constitution. He could not Act on the advice of his Ministers. Notwithstanding the declared finality of the order of the president the Court had jurisdiction in appropriate case to set aside the order, if it appeared that it was passed on collate a considerations or the rules of natural justice were not observed or that the presidents judgment was coloured by the advice or representation made by the executive or it was founded on no evidence. But the Supreme Court would not sit in appeal over the judgment of the president" nor would the courts determine the weight which should be attached to he evidence. After Shaker Singh's case, as pointed out by His Lord Justice Iyer, this part of the decision would be seriously affected as it would be doubtful whether such an interpretation as to the personal satisfaction of the president was correct. Still, however, as pointed out by His Lordship Justice Iyer, the independence of judiciary being a cardinal principle of the Constitution, in all conceivable cases the consultation of the highest dignitary of the Indian justice would and should be accepted by the Government of India and the Court would have an opportunity to examine if any other data entered into the Prime Minister if he departed from the counsel given by the Chief Justice of India. Therefore, in practice the last word in such at would belong to the Chief Justice of India because would ordinarily be regarded as vitiating the order even in the of the learned Chief Justice the broad basis of Article 235 was said to be that the Governor would Act on the recommendation of High Court. As earlier pointed out, therefore, in view of these settled on the cognate schemes of these two other Articles, which completed the scheme of the independence of judiciary, the consultation a substitution as envisaged in these decisions and not a mere empty formality.

48. The material question which next arises is that the constitutional provision having provided for demonstrable Section 10 Independent third party, whether the consultation of the tide by informing him of this serious proposal is news necessarily ruled out. As pointed out by His Lordship Iyer J, the independence of the judiciary being a cardinal principle of the Constitution, this consultation with the Chief Justice of India was made obligatory because would be coming under executive control. Therefore that is a necessary fetter enacted in express terms to rule out executive control. That does not necessarily exclude this elementary consultation or information of the proposal to the judge concerned in accordance with the minimum principles of natural justice as contemplated by our developed administrative law, while exercising such a high power with so serious and grave consequences which would affect the status of office of the High Court Judge and would result in the prejudicial consequences by his right to practice being curtailed in the other State High Court to which he is transferred.

49. After the classic decision in *A.K. Kraipak v. Union of India*[41], the dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. It was in terms held at page 155 that with the increase of the power of administrative bodies it was necessary to provide guidelines for the just exercise of the power. In matters like this public good was not advanced by a rigid adherence to precedents. New problems called for new solutions. It

was further observed at page 154 that 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 power is expected to be exercised. In a welfare state like India which is regulated and controlled by the rule of law 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 vitality 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

[41] A.I.R. 1970 S.C. 150

fair decision. At page 156 after referring to the various English decisions it was observe that the horizon of natural justice was constantly expanding and it was pointed out how such prejudicial administrative orders involving evil consequences would also have to meet the test of these minimum principles of natural justice in the sense of Acting justly and fairly. If there is a duty to exercise jurisdiction, whether it be administrative, executive or quasi-judicial, fairly applying the mind dispassionately to a fair analysis of the particular problem and the information available to such officer in analysing it, and the court was satisfied that the officer was not so doing, the mandamus would always lie whatever would be the nature of this function. It was further emphasized that arriving at a just decision was the aim of both the quasi-judicial as well as administrative inquiries. Therefore, even when the matter was of a recommendation to be made, it was held that such an administrative function for the final selection by the U.P.S.C. where such a recommendation would have a great weight required the minimum principles of natural justice to be followed for justly performing that administrative function. That is why in *State of Gujarat v. Ambalal*[42], in the context of Rule 4 of Land Acquisition (Companies) Rules 1963, it was held-

> Although the above mentioned rule is silent regarding the mode and method of the enquiry to be held by the Collector and the report of the collector is of a recommendatory character, yet regard being had to the legislative history and purpose of the rule, and the mischief sought to be prevented, we have no hesitation in holding that, in conducting the enquiry, the Collector has, in the interest of fair play, to observe the principles of natural justice by affording the persons interested in the land a reasonable opportunity of being heard and of adducing material before the Collector to refute the allegations of the company. The concept of natural justice as evident from the observations made in A.K. Kraipak's case (supra) has undergone a great deal of change in recent years. The dividing line between an administrative and quasi-judicial function is often blurred.

50. In *Assistant Collector, Customs v. Malhotra*[42], Their Lordships had considered the House of Lords decision in *De Verteuil v. Knaggs*[43] where the question had arisen under the Trinidad Immigration Ordinance No. 161 under which the Government could pass an order transferring

indentured labour from one employer to another without notice to the concerned employer against whom complaints as to treatment of the labourers were made. The section provided that if at any time "it appears to the Governor on sufficient ground shown to his satisfaction that all or any of the immigrants indentured on any plantation should be removed therefrom, it shall be lawful for him to transfer the indentures of such immigrants - to any other employer". Construing this provision, Lord Parmoor observed at page 560 of the report:

> The ordinance does not prescribe any special form of procedure, but there is an obvious implication that some form of inquiry must be made, such as will enable the governor fairly to determine whether a sufficient ground has been shown to his satisfaction for the removal of indentured immigrants - what is the procedure which in such a case the law will imply when the legislature is silent? The Acting governor was not called upon to give a decision on an appeal between the parties,

[41] A.I.R. 1976 S.C. 2002 (2004-2005) [43](1918) A.C. 657
[42] A.I.R. 1972 S.C. 689

> and it is not suggested that he holds the position of a judge or that the appellant is entitled to insist on the forms used in ordinary judicial procedure - on the other hand, the Acting governor could not properly carry through the duty entrusted to him without making some inquiry whether sufficient grounds been had been shown to his satisfaction that immigrants indentured on the La Glaria estate of the appellant should be removed. Their Lordships are of opinion that in making such an inquiry there is, apart from special circumstances, a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice.
>
> The classic decision in Kraipak's case was followed and it was pointed out that if the power of preparing a selection list without the power to appoint, as in Kraipak's case, and power to transfer indentured labour from one to another employer were held, in the context or their respective provisions, to be quasi-judicial powers, there was no reason why, when the statute required the determination of a sufficient cause on facts produced before the collector should be held not to be a quasi judicial function or at least a function requiring judicial approach.

51. Even in the decision in *Jagdish Pandey v. Chancellor, Bihar University*[44], the question had arisen as to the true interpretation of Section 4 of the University of Bihar, Bhagalpur and Ranchi (Amendment) Act, 1962 under which the Chancellor was said to have been conferred unanalyzed powers without indicating any criterion, as on the recommendation of the university service commission with respect to the teachers covered by it, he could uphold or refuse to uphold the appointment. Section 4 was read down because of the intention of the legislature that all appointments and dismissal which were made between the two concerned dates should be

scrutinized and the scrutiny must be for the purpose of seeing that the appointments, dismissals etc., were in accordance with the University Act and the statutes, ordinances, regulations and rules framed there under, both in the matter of qualifications, and in the matter of procedure prescribed. If the appointments etc. Were in accordance with the University Act etc., the chancellor would uphold them, and if they were not, the chancellor would pass such orders as he deemed fit and, therefore, read down this way, with this implication, there was no unfettered power conferred on the chancellor. After first finding out this limit on the chancellor's power for passing an order there under, as to the question of necessity of the commission giving a hearing to the teachers concerned, it was held at page 357-

> Now Section 4 provides that the chancellor will pass an order on the recommendation of the commission. It seems to us reasonable to hold that the commission before making the recommendation would hear the teachers concerned, according to the rules of natural justice. This to our mind is implicit in the section when it provides that the commission has to make a recommendation, to the chancellor on which the chancellor will pass necessary orders. If an order is passed under Section 4 even though on the recommendation of the commission but without complying with the principles of natural justice, that order would be bad

[44] A.I.R. 1968 S.C. 353

> and liable to be struck down.This decision settles the question in such a context that although the power was of the chancellor to pass the order on recommendation of the commission the hearing was to be given by the commission before making the recommendation to the concerned teacher. The reasoning will be all the more appropriate in the context of such a highly sensitive power vested in the president which is to be exercised against such a high office only after consultation of the Chief Justice of India, who being a third party would be more appropriately expected as per this settled legal position to hear the judge concerned. Therefore, on these settled precedents not only this mandatory safeguard of this independent consultation by the third party like the highest judicial head would be one of a substantial consultation as envisaged in the aforesaid decisions but even as per the minimum principles of natural justice as per the modern developed administrative law, this high power reposed in the head of the nation to be exercised only in consultation with the highest judicial head against such high office of a High Court Judge, is to be exercised for a demonstrable public interest only in accordance with the minimum principles of natural justice after first consulting the concerned Judge as regards this proposal. It is only the concerned Judge who can bring to the notice of the learned Chief Justice the relevant prejudicial consequences as per the constitutional provision in Article 220 as to how far that right would be prejudiced. It may, be that the Judge's transferred to the very state in which he had first practiced, before he detailed in the other state, where he joined the judiciary, in which event his right of practice would be very grossly prejudiced. Besides, the personal factors as to his personal injuries which

> would have to be thrown in the delicate balance in this sensitive subject could be brought to the notice of the learned Chief Justice only by the Judge concerned. In this particular case the allegation of the petitioner was that because of his giving such an important judgment against the union he had been picked up. In this context when the executive seeks to exercise the power of transfer, it being one of the most important litigant against whom the Judge concerned has to decide, this would be one of the very crucial relevant factors on which learned Chief Justice could have material for his advice only after first consulting the Judge concerned.

52. If the public interest ground of national integration, which was in the forefront in the minds of the president as well as the learned Chief Justice who was consulted in that behalf, was brought to the notice of the concerned Judge, he would have been able to persuade where the dominant public interest lay.

53. In matters of Judges' transfers, the matter would involve both a determination as to the policy and thereafter selecting the person or the individual for that purpose. So far as the policy question is concerned, when the 25 years' existing policy was being departed from, the policy decision envolving new norms should have been first taken. All these demonstrable matters are not bought on the record in spite of the specific pleading of the petitioner. The matter of public interest would always be demonstrable as an objective factor. It would not be a subjective satisfaction of a subjective fact but a subjective satisfaction of an objective fact, in the context of such a transfer order. The person concerned being so prejudicially affected, he alone could bring in the personal facts and so, he should have been at least first consulted by giving him an opportunity to have his say against the proposal so as to dissuade the authorities concerned from passing the order involving these serious consequences.

54. After the decision in *Rohtas Industries Ltd. v. S.D. Agarwal*[45], the legal position is well-settled. After approving the house of lords decision in *Padfield v. Minister of Agriculture Fisheries and Food*[46] that no discretion would be unfettered in such public regulations, their lordships held that-

> "...There is no such thing as absolute and untrammeled 'discretion' that is that Action can be taken on any ground or for any reason that can be suggested to mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however, capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. 'Discretion' necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the

colour of his hair? The ordinary language of the legislature cannot be so distorted. In particular we would like to emphasize the observation that 'there is always a perspective within which a statute is intended to operate."

The paramount rule would always remain that every statute was to be expounded according to its manifest or expressed intention, and even when words were used "appear to them to be necessary" in a statute conferring powers on a competent authority, that would not necessarily make that authority the sole judge of what were its powers as well as the sole Judge of the way in which it could exercise such powers as it may have. Therefore, if we go as per the true perspective, then this constitutional power is intended to operate so as to exclude any interference with the independence of the judiciary and to enable the transfer of Judges when it is found necessary by the president in the public interest so as to make his fresh appointment by such transfer to the other state High Court. Such a power could never be an unfettered power by making the president the sole Judge of that power as well as the sole Judge in the way in which it could be exercised. The necessary implication would be of the power being justly and fairly exercised after consulting the petitioner by giving him a notice of this proposal and considering his representation so that not only the relevant facts as to his personal injuries, including the prejudice to his right to practice as well as regards other serious public injuries, including his grievance that this high litigant is really, seeking to exercise this power in a penal manner because of the independence objectivity and fearlessness exhibited by the concerned Judge in discharge of his judicial functions, could be brought to the notice of the learned Chief Justice.

55. Besides, as pointed out in the decision in *Rampur Distillery and Chemical Co. Ltd. v. Company Law Board*[47] , where the question had arisen regarding

[45] AIR 1969 S.C. 707 [47] A.I.R. 1970 S.C. 1789

[46](1968) 1 All E.R. 604

the satisfaction of the Central Government in the context of exercising the power of approval of the appointment of managing agent of a company under Section 326 of the Indian Companies Act, 1936, at page 1792:

The satisfaction contemplated by Section 326 must, therefore, be the result of an objective appraisal of the relevant materials. The reason is clear. By Section 126 several restrictions upon the power of the companies and individuals to carry on business are imposed in the interest of the shareholders, the creditors and in the larger interests of the public. The order made by the Central Government under Section 326 may result in serious detriment of the company and the proposed managing agent, but in the larger public interest, if it is valid they have to suffer it. Exercise of the power conferred upon the Central Government is restrictive of valuable rights of the company and of the proposed managing agent, and severely restricts the liberty of contract.

Therefore, it was held that the Central Government was not made the final arbiter of the

existence of the grounds on which the satisfaction may be founded. The satisfaction of the Government which was determinative was satisfaction as to the existence of certain objective facts. The recital about satisfaction may be displaced by showing that the conditions did not exist, or that no reasonable body of persons properly versed in law could have reached the decision that they did. The courts were not, however, concerned with the sufficiency of the grounds on which the satisfaction was reached. What was relevant was the satisfaction of the Central Government about the existence of the conditions specified in Section 326(2)(a), (b) and (c) The enquiry before the court, therefore, was whether the Central Government was satisfied as to the existence of the conditions, the existence of the satisfaction could not be challenged except on the ground that the authority Acted mala fide. But if in reaching its satisfaction the Central Government misapprehended the nature of the conditions, or proceeded, upon irrelevant materials, or ignored relevant materials, the jurisdiction of the courts to examine the satisfaction was not excluded. The power necessarily implied a duty arising from the nature of the Act empowered to be done, the object for which it was to be done, the conditions in which it was to be done, and its repercussion upon the power of the company, the shareholders, the creditors and the general public for whose benefit the power was to be exercised. Although the court is not to sit in appeal, the court would have to consider whether in arriving at its decision the authority had restricted itself to the enquiry contemplated to be made and had taken into consideration all the relevant circumstances and that its decision was not vitiated by irrelevant or extraneous matters. It is this approach which has to be followed even in the context of this high power of transfer with such grave consequences and, therefore, on the very first ground that the petitioner was not consulted at all before passing this gravely prejudicial order, the transfer order must be held to be illegal.

56. Mr. Seervai is also right in urging that in such cases the mere recital of consultation in the impugned order to the effect that in exercise of powers under Article 222 the president had after consultation with the Chief Justice of India been satisfied to transfer the Judge would not be sufficient to show that the consultation was not an empty formality but consultation has to be demonstrated before the court when it is put in issue. In the present case the consultation was not after giving the minimum opportunity of hearing to the petitioner by consulting him in the first instance. It is the very implicit condition of this high power. The authority tendering the advice could not give a fair and just advice especially when the consequences were so serious and which only the petitioner could effectively point out so as to persuade the learned Chief Justice to advise the president not to effect such a transfer.

57. Once the perspective of this power is held to be not a penal power or a private purpose of the Minister or any other person but only a public interest or purpose which makes it necessary to make such a transfer simpliciter by appointing the Judge concerned in another court, the other safeguard of such bare minimum principle of natural justice of consulting at least the judge

concerned and of reasonably, fairly and justly exercising this power would necessarily flow from the settled requirement of an effective consultation which is not an empty formality. As earlier indicated, the transfer would involve first a question of policy decision as per its true perspective of the requirement of public interest and thereafter selection of the individual Judge concerned. On the first aspect the necessities of such public interest would be a matter of high policy decision where the individual consideration would have to be wholly subordinated. The illustrative grounds of such public interest even as indicated by Mr. Raman were of national integration or expertise. So far as the first ground is concerned of national integration, proper norms would have to be evolved after duly considering the necessity of departure from the twenty-five years' settled norm of practice and convention of transferring such Judges with consent so that by their hearty cooperation they would be the effective instruments of implementation of this high national policy. In any event relevant norms would have to be laid down first for making the consultation effective and thereafter those norms would have to be applied while considering the individual selection. In the other aspect of expertise, the individual selection would play a larger role but in all these questions at some stage this high administrative decision ceases to be a mere policy question and directly impinges on the individual Judge's office and when the individual question is dealt with resulting in such graver consequences, both of the prejudice to the right to practice and of the individual and the public injuries, this safeguard of minimum natural justice would alone make this consultation safeguard really effective so that the learned Chief Justice of India could fairly and justly advise the president after the individual is informed of the proposal and he may have been consulted in that behalf. This safeguard does not in any manner whittle down this constitutional power because the ultimate decision would rest with the high authorities alone but it would only comply with the minimum requirement of our developed administrative law by making the exercise of this high constitutional power fair, just and reasonable as envisaged by the constitution-makers while investing such highly sensitive power for the salutary purpose of public interest so as to affect the Judge's office at the place where he had been appointed. How the learned Chief Justice makes the consultation and whom he consults would be a matter of his discretion. However, for a fair exercise of this power, as indicated in *State of Assam v. Bharat Kala Bhandar*[48], when power based on subjective satisfaction of the Government under Defense of India Rules, 126AA(4) had to be exercised which had wide and serious impact on the concerned interests, the consultation of the concerned interests must be insisted upon by the proper collection of all relevant data with the help of those

[48] AIR 1967 S.C. 1766

concerned and some kind of representation of those interests concerned must be held to be the barest minimum necessary to enable a fair and just exercise of such a power. It would be important to notice in this context that in the initial appointment under Article 217(1) the Judge of the High Court of the state is to be appointed only after consultation with the Chief Justice of India, the governor of the State, and, in the case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court. Even the form of oath prescribed in the third schedule in Form No. VIII provides as under-

I.A.S. having been appointed Chief Justice (or a Judge) of the High Court at (or of)...do swear in the name of God/solemnly affirm....

Therefore, the initial appointment as per the oath of office is for the office held in the High Court at (or of) a particular State and that is why the mandatory consultation is not only of the Chief Justice of India but also of the head of the state and head of the state judiciary so that their views could be properly ascertained to serve the best interest of the administration of justice by selecting the proper man to occupy this high office of the state. Mr. Raman pointed out that in the Article 222(1A), so far as Jammu and Kashmir is concerned, in addition to the consultation of the Chief Justice of India, the safeguard is provided of the consultation of the governor of the state but no such additional safeguard is provided so far as the other states are concerned. That itself makes it amply clear that this transfer as per its true perspective being transfer simpliciter for serving this high public interest, the constitutional safeguards have been made so that the president gets proper advice from the independent source of the Chief Justice of India and in case of such a sensitive State like Jammu and Kashmir, even the advice from the governor concerned. In a country like ours it may happen that on various occasions the state and the union may not see eye to eye. When such a high office of the highest judiciary of the state is sought to be affected, the constitutional provision under Article 222 may make only the mandatory consultation of the learned Chief Justice of India sufficient. Still however, the learned Chief Justice when he gets the proposal from the Union of India in this behalf may for making his consultation effective and for the just and fair exercise of his power even consult, and is not precluded from consulting, all those who are consulted at the initial stage of appointment of a Judge, namely, the governor of the state and the Chief Justice of the state for effectively exercising his function. When the policy question of settling the initial norms arises, one thing is clear that proper norms would have to be first evolved for the exercise of this high power, when this transfer simpliciter is sought to be effected as per its true perspective only on the ground of national integration. As no ground of expertise was suggested in this particular case and mass transfers have been based on this ground of national integration, the union was bound to demonstrate before us that norms had been first duly evolved after the learned Chief Justice had been informed of the necessity to depart from the settled norm of twenty five years and then only the question could be decided whether relevant norms alone have influenced this decision so far as the petitioner is selected.

58. In *P.L. Lakhanpal v. Union of India*[49], after first setting out how the duty to Act judicially under a statute where it is silent could be inferred from the five relevant factors,

[49] A.I.R. 1967 S.C. 1507

by reading the express provisions of the statute along with the nature of the rights affected, the manner of the disposal provided, the objective criterion if any to be adopted, the effect of the decision on the person affected and other indicia afforded by the statute, their lordships answered

the pertinent question as to whether an administrative function at all stages retains the same character. It was held that it was well recognized that a function or power which in its inception was purely ministerial may sometimes become quasi-judicial at a later or some intermediate stage during the course of its exercise. At the stage at which it attains the nature of a quasi-judicial function by impinging on the individual rights, the authority entrusted with that function has to comply with the rules of natural justice and give an opportunity to the party concerned of representing his case. Therefore, when this function which was of a policy decision in the context of the question of national integration reached the-stage of selection of the individual Judge for transfer, at that stage as per the developed administrative law the duty to Act fairly and justly arose as per the aforesaid Kraipak decision after consulting or informing the petitioner of the proposal of transfer so that he could dissuade the learned Chief Justice from tendering the advice. As pointed out in Lakhanpal's case at page 1511 the authority could not come to a decision properly unless it had first the relevant dependable materials and he could not have the certainty derived about all these materials especially when personal factors were concerned including the question of prejudice to the right to practice unless the person concerned was given an opportunity to have his say after he was informed of such a proposal and the changed norms so that he could persuade the learned Chief Justice that the dominant purpose of national integration would not be served by the proposed transfer or that the proposed transfer was for extraneous considerations as urged by the petitioner. In any event this safeguard would be consistent with the principle of de minimum which would have a great bearing in the context of such high constitutional powers. The higher the responsibility and the higher the authorities to exercise such power and the higher the person against whom such power is exercised, the greater would be the duty always to see that least harm is done to the person concerned and to the public interest when the power has to be exercised only on the exigencies of dominant public interest.

59. Therefore, even though we have not made any implication as urged by Mr. Seervai on the first question which would clearly defeat this high constitutional power and which would be against the intrinsic evidence of that constitutional power with its implicit compensable injury, so far as the effective real consultation is concerned, the norms would have to be implied along with the minimum safeguard of the principle of natural justice to consult the Judge concerned at least at the stage when the individual is selected. The selection being for such high office, in the state other than the one where the Judge was appointed, would have to be done after duly applying the mind to all the relevant factors involved in this highly sensitive subject. In the earlier two decisions of the Supreme Court even for transfer of a judge of the subordinate judiciary, it had been pointed out that the transfer may be more harmful than punishment and the transfer would involve such weighing of serious considerations that it would never be left only to the executive, which itself would emphasize the greater need of those principles being fairly and justly applied when such high office of the state is sought to be individually dealt with so that the transfer remains within its proper perspective as envisaged by the framers of the constitution and no larger injury is inflicted than what is absolutely necessary, as is implicit in the principle of compensable injury adopted while affecting the office in the state in which the concerned Judge

was appointed.

60. Mr. Raman, however, raised various questions in this context. His first argument was that this was an unfettered power and the burden of the whole argument of Mr. Seervai was the unfounded assumption of judiciary remaining in total isolation which alone would secure its judicial independence. The whole thrust of the constitutional provisions and even the various service conditions prescribed by the parliament disclosed that even in the matter of leave, pension, etc., the executive had to discharge some aspect of control by sanctioning the leave and even other financial benefits. The harmonious interpretation, if any must be in conformity with this high principle of co-operation, which is the keystone of this entire arc of "co-operative federalism" of our Constitution, and the interpretative skills should not be exercised in any spirit of confrontation. Mr. Raman is right that constitution being a dynamic pragmatic instrument capable of growth as a living organism in the direction of its change or becoming, set out in the preamble and the directive principles, as intended by the founding fathers, the constitution must be interpreted as a one whole instrument "where connection and relation is everywhere and at all times". That is the approach we have adopted in the present controversy and it was on account of the very thrust of this constitutional direction that even though on the first question we did not make any implication, on the second question of consultation such implication had to be made to make the consultation real and effective as per the true perspective of this highly sensitive power, and as it was necessarily flowing from the minimum requirements of natural justice of our developed administrative law. Therefore, there is no substance in his contention that this is an exercise in futility or by way of any confrontation but it is really the only way of harmonious interpretation so that this high constitutional power is justly and fairly and reasonably exercised as per the true intention of the framers both in its true letter and spirit.

61. Mr. Raman next argued that the very recital in the order of consultation was sufficient and the burden was on the petitioner to show that the consultation had failed. As earlier pointed out, the recital about the fact of consultation would not lead to any presumption as to the consultation, being in substance and reality as contemplated by the true perspective of this provision. It is true that the power being vested in such high authorities the presumption would be all the greater that the power was bona fide exercised. The question which we are considering is, whether the power was exercised as per its true perspective, justly, fairly and reasonably and that has to be demonstrated when the fact is in issue. That is why the petitioner had joined even the second respondent as a proper party. All the relevant materials and as to how the consultation had been done are with the union Government and when the fact is in issue, they could not rely on any technical ground for not producing the relevant materials which would have demonstrated that the power was exercised in its true perspective and as per the aforesaid guidelines.

62. In *State of Punjab v. Messrs Modern Cultivators*[50], Their Lordships approved the decision in *Murugesam Pilial v. Gnanasambandha Pandora Sannadh*[51]*i* where the classic passage had deprecated such a practice which was really an inversion of sound practice for those desiring to

rely upon a certain state of affairs to withhold from the court the

[50] AIR 1965 S.C. 17 at page 12

[51] A.I.R. 1917 P.C. 6

written evidence in their possession which would throw light on the proposition by relying on the abstract doctrine of onus of proof and failing to furnish to the court best material for its decision. That is why in this decision when the Government did not produce the relevant files which were in their possession showing how the canal breach had occurred and what was done to stop it, it was held that if such documents were not produced, an adverse inference could legitimately be made that if produced they would have gone against the case of the petitioner, that is, they would have proved that the defendant had been negligent. The Acts of such high authorities may not ordinarily be amenable to public scrutiny but when such a proper issue has been raised, the union was bound to demonstrate by producing the relevant materials subject, of course, to the claim of privilege, if any, that this high power was duly exercised as per its true perspective and guidelines as aforesaid. Public confidence and faith in this high sensitive power could only be secured not by mere bald assertions but by Actual demonstration of its just exercise when a controversy is raised in a court. That is why Mr. Raman last relied on the ground that the pleadings did not make out any prima facie case and that is why such vague pleadings have been met with such vague denial. The petitioner having never been informed in this connection, the petitioner could only plead his case in the manner in which he has pleaded. As pointed out at the outset, the petitioner could only state that he was never consulted or informed in this connection and he presumed the same to be true even for other judges. The petitioner also averred how the 25 years' settled norm had been departed from and he could not say whether on this aspect the learned Chief Justice was consulted or not and he merely stated that fact, and pointed out the legal effect, if after consultation the learned Chief Justice had tendered an advice to the contrary against the serious proposal of transfer after all the relevant facts of the various personal and public injuries were pointed out by the learned Chief Justice. The petitioner also stated how his transfer was for extraneous considerations and militated against public interest, as in the case of four other judges which he had recited, where it had been alleged to be exercised because they had similarly given important judgments showing independence, objectivity and fearlessness. That is why it was vehemently argued in absence of any material on record that all this could not be a remarkable co-incidence. The pleading about personal injuries apart from prejudice to the right of practice had set out illustrative consequences to most of the Judges and the tendency of such transfer from one state to another to uproot the Judge from his own state where he took charge of the office. Maintenance of two establishments was stated even in Mr. A.K. Sen's speech. In the petitioner's own case, he had no house in the city of Ahmadabad and after he became a Judge, his parents aged 81 and 80 were staying with him and at that age they required medical treatment and his unmarried daughter practicing dentistry would have no house to go if the Judge was transferred. These were illustrative consequences and if public interest necessitated the transfer, they would assume little importance but they were asserted only to show how the relevant factors would have to be considered at least by the learned Chief Justice. For individual selection of the Judge concerned the factors of individual merits and demerits and such other relevant factors have been held as per the settled law to be relevant criterions even for the lower judiciary. That is why all

these relevant factors were only mentioned to show the width of such a power in the executive which would be capable of inflicting serious injuries on a judge of the superior court gravely affecting the independence of the judiciary. In the affidavit-in-reply the personal injury aspect was summarily disposed of because it could not be urged that in effecting these transfers, the personal injuries to the petitioner were taken into account because as alleged by the petitioner, he was never informed in this connection and these personal matters only the individual concerned could point out. The compensatory allowance and travelling allowance aspect would hardly show that these personal and public injuries were irrelevant for exercise of this power. The petitioner in the rejoinder had pointed out how inadequate would be such compensation and in any event it would depend upon the special facts of each individual which would have to be gone into. So far as the public injuries are concerned, it could not be denied that the petitioner had not made the relevant averments as the want of knowledge on the part of the Judge of local statutes, rules, notifications, regulations, orders and by-laws and want of knowledge of the language would seriously affect the discharge of his judicial duties and injury would be all the more aggravated in criminal cases where the proceedings would be in the regional language which such a transferred Judge did not know. The petitioner had pointed out how in the exercise of the various constitutional duties of the High Court in the matter of control and in the matter of appointment of Judges from the bar or from the services he could effectively participate. All these were merely the relevant factors and the grievance of the petitioner was only that the duty of the learned Chief Justice was to bring to the notice of the president the personal and public injuries which would be caused. Similarly, the duty of the learned Chief Justice was pointed out as to drawing the attention of the president to the policy statement and guideline of twenty five years as per Mr. A.K. Sen's speech in 1963. It was only when all these things were pointed out that the proposal emanating from the executive for such transfer could be examined whether it served the public interest or militated against the same. It is in that context that mention was made that so far as such mass transfers were concerned where norms would be a must, even the views of the judiciary might be relevant in any event the petitioner could only point out what were the relevant considerations because he had no knowledge as to what had happened and that is why his duty ended with making these averments, after even duly joining the second respondent as a proper party. The Government, however, has admittedly taken up a surprising and completely vague stand, going to the extent of urging that the learned Chief Justice was unnecessarily imploded and that it was neither open to the petitioner to question nor inquire how and in what manner the president had consulted the learned Chief Justice before issuing the order of transfer, on the bald ground that the transfer was legal and proper as for national integration this power had been exercised. It is pointed out that it was absolutely essential for the purpose of national integration and for introducing a robust national outlook into our judicial system that judges should be transferred from one High Court to another, so that there is an element from outside the particular state in the highest judicial tribunal free from local bias, free from local prejudices and completely devoted only to the supreme task of administering justice equally and impartially. It was, therefore, the considered opinion of the Central Government that the policy of effecting all-India transfers of High Court judges would not only strengthen the administration of justice

but also promote healthy traditions in the interest of dispensation of justice in the country. The need of implementing this policy was stated to have been emphasized even by the petitioner in his speech and that similar views were expressed all over the country from various sections of public urging the Government to effect all-India transfers of High Court Judges which according to them would be in the larger interest of the higher judiciary and the litigant public of this country. Reference was made to the Reorganization Commission Report of 1957 as to how judiciary composing of Judges from outside the state would be more independent having less local connections. Therefore, it was stated that such transfers strengthen national integration and promote judicial independence cutting at barriers of regionalism and avoiding evils resultant from over-localization of interests and influence. This part of the pleading would only show that the transfer was decided upon in public interest on the ground of national integration but that does not deal with the crucial questions raised in the petition as to whether the consultation had been the effective consultation after duly consulting the Judge concerned and after settling the relevant norms even though the policy decision had to be taken after duly applying the mind to the question of departing from the settled practice of twenty-five years. Nothing was pointed out on record to demonstrate how effective consultation had taken place on this salient aspect or whether the consultation safeguard had failed because the learned Chief Justice had given a contrary advice. The duty to demonstrate such effective consultation was all the more apparent when the petitioner had come out with the allegation of the transfer being penal in nature and when nothing was shown as to how individual selection had been done and on what basis so as to ensure that this high power was duly exercised as per the true perspective and after keeping in mind the relevant factors therefore, so far as the third ground is concerned, the petitioner must succeed on the short ground that the petitioner was never consulted or informed of even this proposal of transfer as per the minimum requirement of natural justice and because it has not been demonstrated before us by any material on record that there was effective calculation of the Chief Justice of India as required by this mandatory provision of Article 222(1).

63. We need not mention the contention stated in the affidavit-in-reply which had rightly not been urged that the petition had became in-fructuous merely because the petitioner complied with the order and only filed the petition as a test case to have this constitutional question legally settled. Mr. Seervai with his devoted zeal to the cause rightly stated that the petitioner only wanted the constitutional question of the true interpretation of this salutary provision in Article 222(1) being settled, and, therefore, even no interim relief had been sought and even costs were not advisedly claimed in the petition.

64. In the result this petition must be allowed only on this limited ground. The impugned transfer order dated May 27, 1976 at Annexure "A" is, therefore, declared illegal, invalid and ultra vires, and a mandamus is issued against the first respondent, Union of India, to treat the said order as of no legal effect and consequence against the petitioner, and to desist from giving effect or continuing to give effect to it. Rule is accordingly made absolute with no order as to costs.

A.D. Desai, J. –

65. The petitioner who had been a Judge of this Court has filed this writ application challenging the order dated May 27, 1976 of his transfer made by the President of India under Article 222(1) of the Constitution of India. The petitioner did not ask for any interim relief as he did not want to continue as Judge of the High Court of Gujarat under force of an interim injunction if granted by the court, but he accepted the order under protest. The grounds of challenge of the impugned order are:

(1) That on a true construction of Article 222(1) of the Constitution of India, no power or authority is vested in the President of India to pass an order of transfer of a High Court Judge, except without such Judge's consent.

(2) That in any case the power of the president to transfer under Article 222(1) of the constitution is not unfettered and the consultation of the Chief Justice required under the article is substantial and not a formal one. In passing the impugned order the relevant factors have not at all been taken into consideration and the impugned order has been passed for a purpose other than one underlying the provisions of Article 222(1) of the constitution and hence illegal, void and nullity.

(3) That the speech made by the law Minister Shri A.K. Sen in the Parliament while moving the 15th Amendment in the Constitution (the relevant part is reproduced in the petition and also supplied at the time of hearing; vide Lok Sabha Debates Vol. XI, 1962, December 5-11, 3rd Sessions, Columns 5207 and 5208) constituted a promissory estoppel as the petitioner had accepted the office of the Judge of the High Court on the basis of the representation made therein and, therefore, the impugned order is bad and illegal.

66. The Union of India and the Chief Justice of India are respectively respondents Nos. 1 and 2 in this petition. The Union of India has filed an affidavit in reply and denied the contentions raised by the petitioner. The Chief Justice of India is represented by Mr. V.P. Raman, the solicitor general of India, who also represent the Union of India. No affidavit in reply is filed on behalf of the Chief Justice of India.

67. Before I consider the question raised in the petitioner, it is necessary to state the preliminary objection raised on behalf of the Union of India. The few relevant facts to understand the preliminary objection may now be stated. At the admission stage the petition was referred to a division bench in view of the important question involved and the hearing of the petition was fixed on July 26, 1976 as no interim relief was prayed for. This full bench has been constituted by the learned Chief Justice to hear the case. Respondent No. 1 had not filed affidavit in time and to enable it to file an affidavit an adjournment motion by consent was made and the case was ultimately adjourned by this bench to August 30, 1976 with a direction that the parties should complete the record by filing their affidavits. On August 30, 1976 the case was heard for the entire day and Mr. Seervai for the petitioner was on the point of completing his arguments on the first point and at that time the learned Acting Chief Justice put certain questions to him in respect to the point that was being argued. The questions were being answered and as the time of the

court was over it rose for the day.

68. In the morning of the next day before the court time, I received a message from the learned Acting Chief Justice calling me to his chamber as some motion in chamber was to be made by a party to the proceeding. The judges constituting the bench assembled in the chamber of the learned Chief Justice before the court time and Mr. Raman made a motion on behalf of respondent No. 1 alone that some correspondence with respondent No. 2, the Chief Justice of India, was made by certain Judges of this High Court including the members of the bench with regard to transfers of High Court Judges and, therefore, the Judges constituting the bench would be embarrassed in hearing the case. He also stated that he was hearing rumours about the correspondence since last 2 days and fee had now received definite instructions from respondent No. 1 to make this motion. He made it clear that he was not making the motion on behalf of respondent No. 2, the Chief Justice of India, as he had no such instruction from him. Mr. Seervai opposed the motion and, therefore, it was decided to hear the objection raised on behalf of respondent No. 1 in the open court. The Full Bench assembled in the court room and the aforesaid objection was raised and repeated in the open court. A specific question was put to Mr. Raman whether respondent No. 1 had any objection of hearing of the case - leaving apart the question of embarrassment of the Judges constituting the bench. The reply to the question was in the affirmative. Mr. Seervai then contended that such an objection should be raised by an application in writing and the soiree of knowledge of respondent No. 1 about, the confidential correspondence between the Judges of the High Court of Gujarat and the Chief Justice of India should be disclosed by respondent No. 1. Some arguments and discussion ensued on the point and Mr. Raman fairly stated that he had not been able to take full instructions in the matter, and, therefore, he was not able to say anything about the source of knowledge of respondent No. 1. He further added that if the entire local High Court bar knew about the correspondence then there was nothing unlikely that respondent No. 1 might also have knowledge about it. Mr. Raman made it clear that he had received no instructions from the Chief Justice of India whom he represents to make such a motion, and the motion was made only on behalf of respondent No. 1, that is, Union of India. After some arguments the case was adjourned to September 7, 1976 in order to enable Mr. Raman to get full instructions and if the objection was to be persued to put the same in writing. On September 7, 1976, Mr. Raman was not present in the Court. Mr. Vakharia, the standing Counsel for respondent No. 1, made a statement in the court that he had instructions to maintain the objection already raised, that he had nothing to argue and the matter was left entirely to the Court. There was some discussion in the court at this stage. A specific question was put to Mr. Vakharia whether he had any objection to the hearing of the case by the bench because the petitioner was previously a colleague of the Judges constituting the bench. The answer to the question was a hesitating one, namely, it was a secondary objection. Mr. Seervai opposed the said motion and contended that the objection raised by respondent No. 1 was not put in writing, that no statement as to Respondent No. 1's source of knowledge about the correspondence was forthcoming, with the result that the objection remained unsupported by any legal ground. Mr. Seervai further contended that the Judge is incapacitated from hearing of the

case if there is "a real likelihood" or has a bias in favour of one of the parties before it and the same test applied also in determining the question of propriety of a Judge to hear the case. It was further argued that a Judge is not incapacitated in hearing a case on the ground of bias or due to an expression of an opinion on a point of law when the objections to it rest on mere hearsay and no definite case is made out in respect of any one of the objections. In support of his contention Mr. Seervai relied upon the decisions in *Nageshwararao v. The state of Andhra Pradesh*[52], *Viswnathan v. Abdul Wajid Reg v. Mayor and Justices of Deal*[53]*: Tathart v. Wright*[54] *Regina v. Camborne Justices and Anr*[55]*. Cordell v. Second Clanfield Properties Ltd*[56]*.* and *United States v. Norgan U.S*[57]*.* Further the contention of Mr. Seervai was that the present case is not one in which the preliminary objection was based en any legal ground but the same was advanced on the basis of hearsay and that to by a responsible party. He contended that the objection was not only flimsy but it was illusory and vague. The test he contended is 'a real likelihood of bias' and it was not established in the present case as the objection was based on mere hearsay. How then could it be said that the judicial propriety or self-restraint required the bench not to proceed with the hearing of the case? Should an objection of this character when

[52] AIR 1959 S.C. 1376
[53] Law Times Reports. Vol. 45, September 1881 to February 1882, pages 439-441
[55] 1955 (1) Q.B. 41
[56] 1969 (2) Chancery Division page 9
[54] (1859) 7 H.L. Case 429
[57] SC reports 85 L.Ed. 1429

not supported by the Chief Justice of India, respondent No. 2 herein who knows the entire correspondence and who does not support the contention raised by the Union of India could be given any weight to disqualify this Court to proceed with the hearing of the case? The petitioner is in Andhra Pradesh, he has filed this writ application in this Court as the cause of Action arose within its jurisdiction and has thus knocked the doors of this Court for justice. Any refusal to hear the case would result in great expense and delay and will amount to denial of justice to the petitioner. He has no other efficacious remedy and to file a writ application in the Delhi High Court as suggested by Respondent No. 1 will not also cause delay but there is no assurance that similar objection or other like objection will not be raised in the said Court. The course of justice cannot be obstructed in this manner; Respondent No. 1 did not raise any objection at the initial stages, delayed the proceedings and raised the objection after hearing proceeded on the material point for the entire day. Hence contended Mr. Seervai the preliminary objection raised by respondent No. 1 should be rejected.

69. Now during the course of arguments a submission was, made that the correspondence between the judges and the Chief Justice of India be ordered to be disclosed. The case was then adjourned and the following order was passed by the court on September 10, 1976:

> An objection having been taken that, because of a letter addressed to the Chief Justice, to which Judges constituting the bench are parties, in which an opinion touching some of the issues arising in this petition is expressed, the Government of India has apprehension that it may not get a fair deal and just decision in this matter.
> Government of India and the counsel for the petitioner stated that they have no knowledge

about the contents of this letter, while we know it. Therefore, even though this letter is a highly confidential communication, which would not be ordinarily allowed to be disclosed, we and our colleagues, who are signatories to the letter, have no objection in view of the peculiar and exceptional circumstances of this matter, if the Chief Justice, the addressee of the letter, desires to produce it.

On the request of the parties the case was adjourned to September 20, 1976. The full bench, therefore, assembled on September 20, 1976 and Mr. Raman filed a written submission supporting the preliminary objection. The written submission was read out in the Court. As both the parties desired to move the learned Chief Justice to constitute another bench and the Judges constituting the bench had no desire to stick to the case before them, the following order was passed by the Court:

As the parties desire to move the Chief Justice for constituting another bench, we adjourn this matter to-morrow at 2-45 P.M.

70. The parties then presented an application dated September 20, 1976 to the learned Chief Justice which is as follows:

In constituting a full bench to hear the *S.H. Sheth v. Union of India and Anr*[58]. The Hon'ble the Chief Justice excluded himself. However before the full bench an objection was taken by the Union of India which was subsequently formulated and

[58] Special Civil Application No. 911 of 1976

read out to the Court. That objection is annexed as No. 1.:

In that annexure it was stated on behalf of the Union of India that: It is further submitted that the doctrine of necessity is not at all attracted for the following reasons:

(i) Not all the judges of this Hon'ble Court could have possibly been parties to any such expression of views on the question. The newly transferred Chief Justice Shri Reedy could not possibly have participated, his lord ship the Chief Justice Shri Reddy did not even object to his transfer but only sought time which was granted; one learned Judge was ill; another was a subsequent appointee. So it is practically not impossible to constitute another bench.

Counsel for the petitioner also felt that if The Hon'ble the Chief Justice constitutes a special bench presided over by himself, and another Judge who was "a subsequent appointee' the solution would be acceptable to him. Counsel for the petitioner and the additional solicitor general for the Union of India having declared their fullest confidence on behalf of their clients that The Hon'ble the Chief Justice should preside over a new bench, it was agreed to request The Hon'ble the Chief Justice to constitute a new bench with himself presiding over such a bench V.P. Raman 20/9/76 H.M. Seervai Addl. Spl. Gen. of India for the petitioner 20-9-1976.

The learned Chief Justice passed an order on. This application to the following effect:

The Chief Justice has constituted a Full Bench consisting of J.B. Mehta, A.D. Desai and D.A. Desai, JJ. To hear the part-heard Special Civil Application No. 911 of 1976 at 2-45

P.M. To-day, i.e., 22nd September 1976.

71. Mr. Raman contended that the real test to determine bias of a Judge is whether in the circumstances of the case a reasonable man will say that the judge is biased and in support of this contention relied upon From *United Breweries Company Ltd., and another v. Keepers of Peace and Justices for Country Borough of Bath*[59], *Metropolitan Properties Co. P.M.G.C. Ltd. v. Lennon and Ors*[60]. and *Hapman v. Bradford Corporation*[61] It is not necessary to deal in details with these cases. The ratio of the decisions is clearly stated by S.A. De smith in his book titled Judicial Review of Administrative Action, 3rd Edition, under caption "Likelihood of bias", at page 231 as under:

> In 1954 the Divisional Court of the Queen's Bench Division, after having reviewed the authorities, held that 'real likelihood' was the proper test, and that a real likelihood of bias had to be 'made to appear not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquries'. This might be regarded as but another formulation of the 'reasonable suspicion' test, for it is the duty of a reasonable man to make reasonable inquiries, if, after having made his inquiries, he is still left with the impression that there was a real likelihood that the tribunal would be biased against him, is it the duty of the court to quash the decision although on the full information available to it, it is satisfied that his suspicions were unfounded? The answer given by Devlin L.J. in a subsequent case was in the negative. Whether a real likelihood of bias existed was.

[59]1926 Appeal Cases 586 [61]1970 Weekly Reports 937

[60]1969 (1) Q.B. 577

> To be 'determined on the probabilities to be inferred from the circumstances, not upon the basis of the impressions that might reasonably be left on the minds of the party aggrieved or the public at large.
>
> However, the pendulum has now swung towards a test of reasonable suspicion, founded on the apprehensions of a reasonable man aware of the material facts. 'Reasonable suspicion' tests look mainly to outward appearances, 'real likelihood' tests focus on the Court's own evaluation of the probabilities; but in practice the tests have much in common with one another, and in the vast majority of cases they will lead to the same result. For the Courts to retain both tests as alternative methods of approach is unlikely to cause serious uncertainty, and there may be advantages in preserving a measure of flexibility.

72. In recent times objections to hearing of cases on the ground of bias of a judge are taken freely and frequently. Such objections if made by litigants or lawyers without any sense of responsibility or based on rumours and conjectures must result in assassination of moral character, and harm the reputation of the Judge concerned and is bound to shake public faith and confidence in the Court of justice which is one of the important limbs on which the democracy rests. The law is, as aforesaid, clear on the point and the party who raises an objection to the

hearing of the case on the ground of bias of a Judge has to prove that there is "a real likelihood of bias" or that reasonable person under the circumstances of the case will think that the judge is bias. The test is whether a reasonable person or right minded person has a suspicion about the bias of a Judge. In practice the test of 'a real likelihood' or a 'reasonable person' will make no difference as the problem in both the cases has to be approached on the basis of a reasonable suspicion regarding the alleged bias. No doubt the decisions cited-at the bar herein before refer to cases in which the appellate court discussed the question of bias of a judge trying the case but that does not make any difference when the point of bias is raised before the trial Judge himself. The same principles will apply if allegations of bias are made before the Judge trying the case.

73. Now we shall consider the facts of this case on the basis of both these principles, namely, the test of a 'real likelihood' or the test of a 'reasonable man'. The facts as they emerge clearly from the record are that ultimately the preliminary objection has been raised in writing and the introductory part of the written submission contains statements which refer to the letter addressed to the Chief Justice of India by the Judges of this court including the judges constituting the bench. It further reads that respondent No. 1 "does not know its contents and has come to understand that some judges of the High Court were signatories to a memorandum or letter regarding the transfer of Judges including the writ petitioner their colleague and brother judges." The written submissions further proceeds that for the purpose of the present request a detailed analysis of the contents of the same is not at all necessary. The submission then states to quote:

> It has now sufficiently transpired from the proceedings in Court itself that:
> (i) Some communication 'expressing an opinion touching on some of the questions arising in the present writ petition' was in fact addressed by some Judges of this Hon'ble court,
> The petitioner replied to these objections denying the correctness of the statements made in paragraphs 1 to 4 of the written submission. The petitioner also denied the correctness of the statements in the written submission relating to the learned Chief Justice of this court. Now I have already pointed out that a request to constitute another bench to hear the case had been rejected by the learned Chief Justice and the application and order made by the learned Chief Justice are taken on record by consent of all the parties. Thus it is evident that the objection that this Court should not proceed with the hearing of the case is based on the only ground that the Judges constituting the bench along with other judges of this Court had corresponded with respondent No. 2 in connection with the transfer of High Court Judges and due to this correspondence, the bench is incapacitated to hear this case. Now this statement made by the Union of India is based purely en hearsay and no inquiry has been made by the party. It must be noted that Mr. Raman, appears for the Union of India as well as the Chief Justice of India, to whom it is said that the letter is addressed by the judges of the court. A bare reading of the written objection clearly indicates that the objection is based on hearsay and the grounds of objection are nothing but conjectures and surmises. It is necessary to note the order passed by this Court on September 10, 1976, where it has been observed:

An objection having been taken that, because of a letter addressed to the Chief Justice, to which Judges constituting the bench are parties, in which an opinion touching some of the issues arising in this petition is expressed, the Government of India has apprehension that it may not get a fair deal and just decision in this matter.

It will be clear to any one who reads this order that this Court in the aforesaid order merely reproduced the objection of respondent No. 1, when it used in the order the words "in which an opinion touching some of the issues arising in this petition "is expressed." There were not the words spoken by the court. Inspite of this it is so stated in the submission. This incorrectness is so obvious that it does not require any further comments. Again the Union of India did not raise any objection on the first date when the case was argued and this conduct of the party has to be noticed. There is uncondonable delay in raising the objection. This delay must necessarily cause inconvenience and expense to the petitioner. The petitioner has no other efficacious remedy. To ask the petitioner to go to another High Court is to ask him to go from one Court to another for justice and such unjust course cannot be adopted. The objection that the petitioner was the colleague of the Judges of this Court and, therefore, this case should not be beared by this bench is not to be found in the written submission. It was not raised on the first day of hearing when the matter was argued for the whole day. It is not that respondent No. 1 had no knowledge as to the members constituting the bench, because the motion was made by respondent No. 1 before the bench on July 27, 1976 for an adjournment. This was more than a month prior to the date on which the case was heard on the first day. Such an objection was not raised even on the next day when the preliminary objection was raised. Such objection then evidently has no value. Further more, it is essential to note that a motion made to constitute another bench is now negatived and the case is required to be heard by this bench. It is clear that the doctrine of necessity applies in the present case with its all force and these are the reasons who I decided to hear the matter. The Court pronounced the order rejecting the preliminary objection and also directed that the reasons for the order shall be given in the judgment and this course was adopted in order to avoid the case being decided piecemeal vide *The Dominion of India and Anr. v. Shriabai A. Irani and Anr*[62].

74. The petitioner challenges the impugned order of his transfer as a High Court Judge to High Court of Andhra Pradesh on the ground that the same is unauthorised and violative of the constitutional provisions. To nut n nut-shell the arguments of the Learned Counsel are as follows. The contention of Mr. Seervai is that in view of the constitutional scheme of independence of judiciary as disclosed by the provisions relating to High Court and Judge! Of the High Courts as well as subordinate judiciary and which has been judicially recognized in various decisions of he Supreme Court the words "with consent" should be read in Article 222(1) of the constitution after the word "transfer" in order that the provisions of Article 222(1) may not conflict with the other provisions relating to the judiciary. Mr. Seervai contends that the rule of interpretation m that in

article of constitution, however simple it may be, cannot be read in to let on but read along with other provisions and if so require, permits son of words and for this proposition relies upon the decisions in *Md. Chamarbaugvalla v. Union of India*[63] *Samsher Singh v. State of Punjab and Anr*[64]. and also on the interpretation of statutes by Maxwell, 12th Ed. Pp. 40-43. Mr. Raman chooses this approach and contends that we are concerned with a written stein and the question is how far judicial independence is recognise our constitution. The judiciary is not completely isolated from the executive in our constitution. The words of Article 222(1) are simple and clear and resort to extrinsic aid for its interpretation is impermissible. Can not this rule of interpretation, he relied upon the decisions in ***G.*** *Narayanaswami v. G. Panelelvam and Ors*[65]. and *Co. Pvt. Ltd. v. Engineering Mazdoor Sangh and Anr.*[66], He also contended that the transferability of High Court Judge under Article 222(1) of the constitution is even more than a condition of service.

75. Now the question is one of construction of an article of the constitution of India - an organic or a live document. The simple rule of interpretation is not to read the provisions in isolation but other relevant and connected provisions must be noticed. The provisions to be interpreted must be read along with other relevant provisions. General proposition that when an enacting part is clear and unambiguous, it cannot be cut down or enlarged by other provisions cannot be accepted. It is the duty of the court to examine every section of a statute in its context and the context is used in its wider sense as including not only other enacting provisions of the said statute, but its preamble, what was the prior law, the existing state of law and the mischief which the statute intended to remedy, Vide, R.M.D. Chamarbaugwalla (supra). It is from this angle that the provisions of Article 222(1) of the constitution are to be examined.

76. Part VI of Chapter V of the constitution provides for the High Courts in federal units or states. Article 214 provides that there shall be a High Court in each state. Article 216 provides that for the constitution of High Court and lays down that every High Court shall consist of a Chief Justice and such other Judges as the president may from time to time deem necessary to appoint. Thus there is a post of a Chief Justice and other posts of other Judges in a High Court in a state or unit. Article 217 has an important bearing on the point in issue and it is necessary to quote the material part thereof:

> 217(1): every Judge of a High Court shall be appointed by the president by warrant under his hand and seal after consultation with the Chief Justice of India, the governor of the state, and, in the case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an additional or Acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty-two years:

[62]1955 SCR 206, 214 [64] A.I.R. 1974 S.C. 2191 2197 [66]1975 (3) S.C.C. 862
[63]1957 SCR 130 [65]1972 (3) A.C.C. 717

Provided that:
(a) Judge may, by writing under his hand addressed to the president, resign his office;
(b) Judge may be removed from his office by the president in the manner provided in Clause (4) of Article 124 for the removal of a judge of the Supreme Court;
(c) the office of a judge shall be vacated by his being appointed by the president to be a judge of the Supreme Court or by his being transferred by the president to any other High Court within the territory of India.
(2) a person shall not be qualified for appointment as a judge of a High Court unless he is a citizen of India and-
(a) has for at least ten years held a judicial office in the territory of India, or
(b) has for at least ten years been an advocate of a High Court or of two or more such courts in succession.
Article 219 provides that every person appointed to be a Judge of a High Court shall, before he enters upon his office, make and subscribe before the governor of the state, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule. The oath to be taken as per the form is that having been appointed as a Judge of the High Court of (the name of the state has to be mentioned), he shall discharge his duties of his office without fear or favour, ill will and that he shall uphold the constitution of India. Article 220 provides that no person who, after the commencement of this constitution, has held office as a permanent Judge of a High Court shall plead or Act in any court or before any authority in India except the Supreme Court and the other High Courts. Article 221 provides that there shall be paid to the Judges of each High Court such salaries as are specified in the second schedule. Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by parliament and, until so determined, to such allowances and rights as are specified in the second schedule, provided that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment. Clauses (1) and (2) of Article 222 are as follows:
222 (1): the president may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.
(2): when a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteen Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by parliament by law and, until so determined, such compensatory allowance on the president may by order fix.
Article 223 provides that when the office of a Chief Justice of a High Court is vacant or when any such Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other judges of the court as the president may appoint for the purpose. Article 224 so far relevant provides that if by reason of any temporary increase in the business of a High

Court or by reason of arrears of work therein, it appears to the president that the number of the judges of that High Court should for the time being increased, the president may appoint duly qualified persons to be additional judges of the court for such period not exceeding two years as he may specify. Article 224A provides that notwithstanding anything in this chapter, the Chief Justice of a High Court for any state may at any time, with the previous consent of the president, request any person who has held the office of a Judge of that court or of any other High Court to sit and Act as a Judge of the High Court for the state, and every such person so requested shall, while so sitting and Acting, be entitled to such allowances as the president may by order determine and have all the jurisdiction, prowers and privileges of, but shall not otherwise be deemed to be, a Judge of that High Court provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and Act as a judge of that High Court unless he consents so to do. Article 229 provides, so far relevant, that appointment of officers and servants of a High Court shall be made by the Chief Justice of the Court or such other Judge officer of the court as he may direct.

77. The underlying scheme as it appears from the aforesaid articles relating to High Courts is that in each federal unit there is a High Court consisting of a Chief Justice and other Judges as may from time to time the president deem it necessary to appoint. The method of appointment of a Chief Justice and other Judges is also provided in Article 217 of the constitution. In order to maintain independence of this superior judiciary, the tenure, salary, pension, allowances, etc. of a Judge of the High Court are protected as special provisions in respect thereof are made in the constitution. The salary and pension are charged on the consolidated fund. The aforesaid provisions have been made so that the executive cannot bring any pressure to bear upon the Judges by threatening to reduce their salaries nor do their salaries can come up for annual revision with opportunity for discussion for their judicial conduct by the parliament. The discussion of the Judge's judicial conduct or Action is thus kept out of the reach of the executive and legislature. The tenure of a High Court Judge is not left to the pleasure of the executive but is insulated from it. The appointment of a High Court judge under Article 217 of the constitution is no doubt made by the president, that is, he has to make on advise of his ministers, Vide *Samsher Singh v. The State of Punjab*[67], but this power is not unfettered, there is a limitation and the limitation is that such an appointment shall be made after consultation with the Chief Justice of the state, the governor of the state and the Chief Justice of India. The consultation with the two federal authorities, namely, the governor and the Chief Justice of the state and with the Chief Justice of the Supreme Court is a condition precedent to the exercise of power under Article 217. The reason for this limitation is that the High Court is a statewise institution and it is recognized that the state authorities concerned must have some voice in the appointment of a High Court Judge. Consultation of the Chief Justice of the state, the governor of the state and the Chief

[67] A.I.R. 1974 S.C. 2192

Justice of the Supreme Court is not a mere formality but must be an effective one. The aforesaid provisions for appointment of a High Court Judge are also made to secure an independent

judiciary, which can decide cases between the state or citizens without any kind of political pressure from the party in power or any other kind of pressure from the executive. The appointment of a High Court Judge is an appointment in a post in a particular High Court and it is not in any judicial service. The tenure of a High Court Judge comes to an end on his resignation or removal or the appointment as a Judge of the Supreme Court or on being transferred as a Judge to any other High Court. A High Court Judge vacates or ceases to hold office either on his resignation, that is, with his consent, or on removal, that is, after an inquiry, that is, after his knowledge, or on his appointment as a Judge of the Supreme Court, and of course this is after obtaining his consent. A High Court Judge also vacates the office on being transferred by the president to any other High Court within the Territory of India. Is the vacation of his office by reason of his transfer under Article 222 of the Constitution to take place without his consent or without giving any opportunity to him to have his say? Is a High Court Judge in case of his transfer left at the mercy of the executive as president is required to Act on the advise of his ministers? The body of Minister has in practice come to play that part in public affairs which was formerly played by the sovereign. The question that arises is whether the vacation of the office by a High Court Judge on transfer is purely dependent upon politicians of all shades or political influence or consideration? It is no doubt true that under Article 222(1) of the Constitution, the president has to exercise his powers upon the advise of his ministers. The power of the president to transfer a High Court Judge under Article 222(1) is limited as he is required to consult the Chief Justice of India. Thus the question of transfer of a High Court Judge is not left exclusively to the executive.

The question is what does word "transfer" as used in the said article in the context of other constitutional provisions means? In the context of its setting and the provisions of Articles 216, 217, 220, 223, 224 and 224A of the constitution, the word "transfer" has the meaning of appointment by transfer. Article 222(1) means that the president may after consultation with the Chief Justice of India transfer by an appointment a Judge from one High Court to another High Court. The word "transfer" means to make over to another; change from one place to another. In proviso (c) to Article 217 of the constitution the clubbing of an appointment by the president of a Judge of a High Court to be a Judge of the Supreme Court with a transfer of High Court judge to any other High Court is not without substance. An order of transfer under Article 222(1) has the effect of vacation of office by a judge who is under an order of transfer and on his transfer to other High Court he takes office in another High Court. He is required to take an oath of the office on his such appointment as per the provisions of Article 219 of the Constitution in the form set out in Third Schedule of the constitution. Further the provisions of Clause (11) of Part D of Schedule III need be noticed. The Clause (11) defines "Actual service" and the relevant part is as under:

> "Actual service' includes-
> (i), xx, xx, xx
> (ii), xx, xx, xx
> (iii) joining time on transfer from a High Court to the Supreme Court or from one High

Court to another.

In this expression the word "transfer" is used instead of the word "appointment" with reference to an appointment of a High Court Judge as a Judge of the Supreme Court. The word "transfer" used in Clause (11) also governs the transfer of High Court Judge from one High Court to another. The definition of the express "Actual service", therefore, clearly indicates that the transfer used therein means an appointment. Thus the constitution makers have themselves used the word "transfer" in the sense of appointment and the word "transfer" used in Article 222(1) and Article 217(1)(c) of the constitution has the same meaning. Articles 127 and 128 of the Constitution refer to an employment as a Supreme Court Judge. Further under Article 127 of the constitution a High Court Judge, who is already in service, is to be requested to attend to the work of a Supreme Court Judge. The word "request" used therein shows that it is not obligatory upon him to join. The person who-is required to attend is given an option. Sub-section (2) of Article 127 refers to the duties and directs that priority has to be given to his duties as a Supreme Court Judge. Sub-section (2) of Article 127 does not control the word "request" as it refers to duties to be performed by a High Court Judge who is designated to work as a Supreme Court Judge. The section imposes no compulsion on the High Court Judge to work as a Supreme Court Judge but given an option to him. The provision of Article 127, according to Mr. Raman, is a condition of service and, therefore, imposes an obligation on a designated Judge to attend to the work in the Supreme Court. I do not agree with this interpretation as the word used therein is "request" and in context it means that option is given to a person who is to be designated as Supreme Court Judge. Mere absence of a proviso, as one finds in Article 128 which also uses the word "request" cannot lead to a conclusion that the word "request" in Article 127 must be considered as imposing a compulsion. Article 128 is clear and the proviso is added thereto by way abundant caution or ex. Abundante cautela. To a question to Mr. Raman by the Court whether Article 128 is a condition of service or not, Mr. Raman replied that it could be a condition of service if the Judge is to be employed immediately after retirement and would not be so if he is requested to be employed after a lapse of period. The answer thus given is obviously not at all satisfactory. The provisions of Articles 127 and 126 relate to employment and such provisions are to be found in United States and United Kingdom, vide Framing of India's Constitution by Shiva Rao's. Vol. II p. 487. Vol. III p. 556.

78. Article 222(1) of constitution provides a special rule of recruitment to a post of High Court Judge in a High Court. The provisions of Article 222(1) and proviso (c) to Article 217 are to be read together. The negative effect of an order of transfer of a High Court judge under Article 222(1) is that a Judge vacates hi office in one state. The positive effect is that he is appointed as a High Court Judge in the High Court of another state. The provision of Article 222(1) is not a condition of service of a High Court Judge because his appointment is only in a High Court of a particular federal state and not in any judicial service. A judicial service for the Judges of the High Court is not contemplated or provided for in our constitution. With regard to High Court

Judges one cannot proceed on the lines of the normal administrative service. Article 222(1) uses the word transfer to mean appointment by transfer and the reasons to use the word are these. The person who is to be appointed by transfer to another High Court is already a Judge of a particular High Court and, therefore, special provisions relating to an initial appointment of a High Court Judge as provided in Article 217 of the constitution are riot made applicable to him. In order to distinguish a first or initial appointment of a High Court Judge under Article 217 from afresh appointment as provided in Article 222(1), the word "transfer" is used in Article 222(1). In the case of an initial appointment under Article 217 a warrant of appointment has to be issued and this warrant ceases to be effective when an order of appointment by transfer as per the provisions of Article 222(1) is made and this is apparent if one reads the warrant which refers to an appointment as a High Court judge in a particular High Court. The warrant has no effect after vacation of the office as a result of an order of transfer under Article 222(1). The argument of learned solicitor general that the warrant remains effective even after an order of transfer under Article 222(1) cannot, therefore, be accepted. An order of appointment by transfer under Article 222(1) takes place of the warrant of appointment. Under Article 222(1) no fresh warrant of appointment is contemplated and the order of transfer itself serves the purpose. For the purpose of an appointment by transfer the constitution does not provide a long process of appointment as is provided in Article 217 because the judge to be so appointed is already a Judge in a High Court. The provisions regarding the manner of appointment do vary with the source of recruitment; there is nothing novel or new in it. Therefore, I understand one thing is certain, as it clearly emerges from the constitutional provisions, that Article 222(1) only authorizes an appointment of a High Court Judge.

79. It is not the argument-and there cannot also be any such argument - that the consent given at the time of initial appointment of a High Court Judge enures for subsequent appointment under Article 222(1) as such consent was given for the initial appointment only and the provision of Article 222(1) is not in the nature of service condition. Article 222(1) provides for an appointment (by transfer); an appointment in turn requires consent of the person to be appointed. There is nothing in the scheme relating to the judiciary as disclosed by the articles in the constitution to indicate that the consent of a Judge for an appointment under Article 222(1) is excluded or that the consent given at" the time of initial appointment enures for an appointment under Article 222(1). Hence such a provision cannot be read into it. Therefore, an appointment of a High Court Judge under Article 222(1) can be made only with his consent. Even in cases where a duly qualified advocate is to be appointed under Article 217 of the constitution his consent has to be taken. He is to be consulted because he has to leave his profession and join the post. So also under Article 222(1), when an appointment is to be made, the judge concerned has to be consulted it must be noted that on retirement a High Court Judge is prohibited to practice in the High Court where he had worked as a Judge, vide Article 220. On a transfer to another High Court the Judge who is so transferred is prohibited from practicing in that Court after his retirement. Thus a further disqualification to practice after retirement is a necessary consequence of an order of transfer of a High Court Judge. Such further disability naturally cannot be imposed

without the consent of the Judge concerned. The Supreme Court Judges (Condition of Service) Act, 1958 and High Court Judges (Condition of Service), Act, 1954 can in no manner be relied upon to construe the provisions of the Constitution as these Acts are subordinate legislations. The provisions of these Acts are merely regulatory and enacted because of financial control. The constitution itself provides for the service conditions of the Judges and gives a further power to the parliament to regulate service conditions but not so as to vary the privileges or allowances or rights in respect of leave or pension to their disadvantage after their appointments.

80. It is further necessary to note that under Article 235 of the constitution, the High Court has a control over-the subordinate judiciary and it is the High Court alone which can transfer any member of the subordinate judiciary. Transrer of a subordinate Judge from one district to another or from one post to another is a power which vests in the High Court. Such provisions have been incorporated in the constitution to preserve independence of judiciary. This is judicially recognised Vide *State of West Bengal v. Nripendra Nath*[68], *State of Assam v. Ranga Muhammad*[69], and Samsher Singh's case (supra). Can, therefore, one say that the word "transfer" as used in Article 222(1) has its ordinary meaning? To construe in that manner will bring the provisions of Article 222(1) in direct conflict with the purpose and intent with which Article 235 has been included in the constitution as Article 222(1) provides only consultation with the Chief Justice. Such cannot be the intention of the framers of the constitution. So in my opinion Article 222(1) provides for an appointment by transfer and such an appointment can be made only if the concerned Judge so consents.

81. It is said that the aforesaid interpretation would defeat the very purpose of the article. If public interest demands a transfer and a Judge refuses to give his consent, the intent to confer power under Article 222(1) of the constitution would be defeated. It is also argued and I said that if one Judge, an expert in a particular branch of law is required to be transferred in public interest in a High Court where there is arrears of matters in that particular branch of law wherein the said Judge is expert, his transfer would be in public interest. If he is not transferred or the Judge refuses a transfer the public interest would seriously suffer. There is also a Judge who Acts with impropriety or bias but the impropriety or bias is such which cannot be established for the purpose of his removal and in such a case public interest requires that the power of transfer under Article 222(1) need be exercised. If the Judge then refuses transfer, the public interest will suffer. To restrict any power of transfer so as to require the consent of the judge to be transferred will render the power meaningless or useless. Now this argument proceeds on presumption that the word "transfer" used in Article 222(1) has its ordinary connotation and has the same meaning which is attributed to the word when used in connection with an administrative service. Such an approach is unwarranted. As regards High Court Judges one cannot proceed on the lines of normal administrative service. An appointment of a High Court Judge is not in any service but it is in a post in a particular High Court. Moreover there are other answers to such an interpretation. First is that the qualifications provided for an appointment of a High Court judge give an assurance against this evil of Acting with impropriety or bias. The very fact that a person with the

required high qualifications is to be appointed as a Judge do indicate that he is a man of reasonable understanding and understands his responsibility. A person appointed as a High Court Judge is an intellectual discipline and a man of conscious who shall Act in a reasonable manner; that he shall not Act unreasonably need be the presumption. Such an intellectual discipline, a man of world and conscious and understanding will exercise his discretion honestly and in good faith. He will surely Act in a manner expected of him. It is for this very reason that the constitution has not provided any administrative control so far as High Courts or the Judges are concerned. A High Court Judge shall not come in the way of a public cause. For an appointment under Article 222(1) persuasion by the highly placed authorities can always prevail over some personal difficulties which a Judge to be

[68] A.I.R. 1967 S.C. 903

[69] A.I.R. 1967 S.C. 903

transferred thinks he will feel because he occupies a high post and status and shall Act reasonably as expected of him. One cannot proceed distrusting such highly placed individuals. What can be achieved by persuasion cannot be achieved by force. Secondly if an individual judge Acts with impropriety or bias the same ought not to be tolerated and proceeding of removal of him from the office must be taken. Top man must be on top in all his affairs touching his duties. Crossed eye or angular vision or Action, either judicial or administrative of a Judge is in breach of his oath viz. To Act without favour, affection or ill-will. Such Actions of nepotism invite extreme remedy; the desperate disease requires the desperate remedy. One cannot close his eyes to this evil. You cannot wash a black moor white. You cannot forget that nature cannot change. What is bred in bone won't come out of the flesh and, therefore, a transfer of such a judge is no remedy - not a remedy which the framers of the constitution ever thought of. An Action of removal is then the only remedy even though cumbersome it is. But it is not in such circumstances difficult as Judge's companions are counsel, advocates-and this includes the advocate ganeral and Government advocates - all intellectuals, and fearless too. The remedy of removal cannot be said to be difficult or which cannot be effectively persued. It is necessary to be a factual or realistic or practical but one cannot be so if the one looses faith in the telling "truth triumphs" or permits the moral standard to fall. Moreover one cannot forget that before an angular vision of a judge makes an appearance, a word by the concerned to the wise is enough; a nod to the wise serves the purpose and a rod may not be necessary. The Chief Justice of the High Court in which such a judge is working has ample powers - such powers had been exercised in past to meet, successfully with such or other evils. Thirdly the judicial conduct of a High Court judge is not a matter for executive consideration. Whether a Judge is an expert in any branch or not is not a matter for the executive to Judge. To construe in this manner is to introduce an executive control, which the framer of the constitution, as disclosed by the scheme never intended. So succumb to this argument is to give power to the executive to differentiate between Judges and the executive will enter into by the backdoor when the constitutional provisions prevent any such entry from any frontier. Fourthly, and as a last resort, if a High Court Judge

disagrees to an appointment by transfer, the principle of independence of judiciary as apparent from the provisions of the constitution must prevail over the suggested interpretation of giving power of transfer to the executive under Article 222(1) of the constitution. Nothing should be done which creates suspicion that there had been an improper influence with the course of justice. This immunity is necessary to serve the public purpose, namely, the administration of justice which requires a Judge to carry out his duties freely and fearlessly without any favor and fear. These matters are of paramount importance. The suggested interpretation would result in an immense and inevitable disservice to the public cause, namely, the administration of justice, as it is likely that an independent High Court judge not liked by the executive may be transferred on the ground of executive assessment of his judicial caliber or conduct or work. This is obviously inconsistent with the principles of judicial independence as recognized by our constitution. In order that greater evil may be avoided such interpretation cannot be accepted. To accept the suggested construction amounts to this that the framers of the-constitution gave the High Court a power to transfer the subordinate members of the judiciary in order to avoid executive interference placed the judges of the High Courts in the hands of the executive. The consultation of the Chief Justice as provided in Article 222(1) of the constitution is no safe-guard because it is only consultation and not concurrence. The constitutional scheme relating to the judiciary clearly indicates that the executive interference on all vital points is excluded. This is so provided in order to keep the judiciary beyond the reach of the executive, otherwise it will give the executive a litigant - nay a major litigant - a power to interfere with the judiciary and judicial functions. The scheme relating to the judiciary as disclosed by the constitutional provisions rejects the idea that High Court Judges are personnel of a Government department.

82. In order to understand the correct meaning of Article 222(1) of the constitution, a reference to the legislative history with regard to the judiciary will not be out of place. Section 220(1) of the Government of India Act, 1935 provided so far relevant that "every High Court shall be court of record and shall consist of a Chief Justice and such other Judges as his majesty may from time to time deem it necessary to appoint. Every Judge of a High Court shall be appointed by his majesty by warrant under the royal sign manual and shall hold office until he attains the age of sixty years". It was further provided that "a High Court Judge vacates his office on his appointment as Judge of the federal Court or Judge of any other High Court". Under these provisions a High Court Judge held the office at the pleasure of the Crown and he vacated the office on being appointed by his majesty, as a judge of the federal court or in other High Court. The word "appointment" had a clear meaning and it must be noted that an appointment of a judge in another High Court was a fresh appointment. In the draft of the constitution prepared by the drafting committee, similar provisions were made in Article 193. The draft constitution was sent to the federal court and the opinion of that court was to make the judiciary independent even in cases of appointments. The suggestion was that an appointment of a High Court judge should be with the concurrence of the Chief Justice of India, vide, Framing of India's Constitution, S. Shiva Rao, select documents, vol. (4). Now the provisions of Article 193 were considered by the constituent assembly which consisted of eminent persons. Pandit Jawaharlal Nehru while taking

part in the discussion on the relevant articles said:

> With regard to the judges and federal Judges especially, the assembly cannot proceed on the lines of normal administrative service.
> He further said:
> Judges presumably in future will come very largely from the bar and it will be for you to consider at a later stage what rules to frame so that we can get the best material from the bar for the High Court or federal court. It is important that these Judges should be not only first-rate, but should be acknowledged to be first-rate in the country, and of the highest integrity, if necessary, people who can stand up against the executive Government, and whoever come in their way.
> Winding up the debate on the relevant Articles, Dr. Ambedkar, the Government spokesman said:
> With regard to this matter, I quite agree that the point raised is of the greatest importance. There can be no difference of opinion in the house that our judiciary must both be independent of the executive and must also be competent in itself. And the question is how these two objects could be secured. There are two different ways in which this matter is governed in other countries. In great britain the appointments are made by the crown, without any kind of limitation whatsoever, which means by the executive of the day. There is the opposite system in the united states where, for instance, offices of the Supreme Court as well as other offices of the state shall be made only with the concurrence of the senate in the united states. It means to me, in the circumstances in which we live today, where the sense of responsibility has not grown to the same extent to which we find it in the united states, it would be dangerous to leave the appointments to be made by the president, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day.. Similarly, it seems to me that to make every appointment which the executive wishes to make subject to the concurrence of the legislature is also not a very suitable provision. Apart from its being cumbrous, it also involves the possibility of the appointment being influenced by political pressure and political considerations. The draft article, therefore, steers a middle course. It does not mike the president the supreme and the absolute authority in the matter of appointments. It does not also import the influence of the legislature. The provision in the article is that there should be consultation of persons who are ex hypothesi, well qualified to give proper advice in the matter of this sort, and my judgment is that this sort of provision may be regarded as sufficient for the moment.
> With regard to the question of concurrence of the Chief Justice, it seems to be that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person, but after all the Chief justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have, and I think to allow the Chief Justice practically a veto upon the appointment of judges is really

> to transfer the authority to the Chief Justice which we are not prepared to vest in the president or the Government of the day. I, therefore, think that is also a dangerous proposition.
>
> Reference to relevant constituent assembly debates is not impermissible such reference can be made to understand the circumstances in which the provisions were made and the purpose and object sought to be achieved, see Samsher Singh's case (supra.) The intention of the fraraers of the constitution was, as is apparent from the various provisions of the constitution relating to the judiciary, to provide for an independent High Court judiciary subjected neither to the executive or any other authority except in the matters of its judicial decisions in which case the Supreme Court is the final authority. The provisions in the constitution to this effect have been made in order to keep the dignity and status of the High Courts and 'to get the best or first rate material, of the highest integrity, who can stand up against the executive Government and whoever come in their way". We have largely followed the British pattern and framed our constitution, subject to our needs. The framers of the constitution, knew the judicial history of britain and due to their experience of the autocratic rule, realised the necessity of an independent judiciary including the High Courts. Judicial independence is made the very basis of our constitution realising the fact that in future the judiciary will have to determine disputes as to right of liberty of citizens and their other rights as against the state including the executive Government the framers of the constitution, therefore, required a High Court judiciary which can decide such disputes without fear or favour or affection or ill-will.

83. It is clear, therefore, that the principle of judicial independence from the executive was accepted by the constituent assembly. The Government spokesman made it clear that the power of appointment should neither be entrusted to the executive nor to an individual howsoever high status he may hold. A via media was found out but the same was "for the moment." The system of appointment in the judiciary as provided in the constitution is one of the checks and balances and this is so provided to maintain independence of judiciary from the executive and also that only fit, qualified persons alone be appointed. It appears that at the revision stage the articles relating to High Courts were re-numbered as Articles 214 to 232 and drafting committee added Article 227(1) vide S. Shiva Rao, the Framing of India's Constitution, Vol. II page 505 thus the provisions relating to the judiciary were introduced in the constitution for having an independent judiciary that is, a judiciary independent of the executive. There cannot also be any dispute in respect of this pre position in view of several decisions of the Supreme Court on the point Vide, ***State of West*** *Bengal v. Nripendra Nath*[70]*, Chandra Mohan v. State of Uttar Pradesh, and Ors*[71]*. State of Assam v. Ranga Miihammed*[72] and *Samsher Singh v. State of Punjab*[73]*,* In Ranga Mohmad's case (supra) Hidayatullah J. In construing Article 235, observed:

> 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 withheld 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, then 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.

Similarly in Samsher Singh's case (supra) Krishna Iyer J. Speaking for himself and Bhagwati J. Observed:

The independence of the judiciary is a fighting faith of our founding document. Since the days of lord coke, judicial independence from executive control has been accomplished in England. The framers of our constitution, impressed by this example, have fortified the cherished value of the rule of law by incorporating provisions to insulate the judicature. Justice becomes fair and free only if institutional immunity and autonomy are guaranteed (of course there are other dimensions to judicial independence which are important but irrelevant for the present discussion). The exclusion of executive interference with the subordinate judiciary, i.e. Grass-roots justice, can prove a teasing illusion if the control over them is vested in two matters, viz., the High Court and the Government, the latter being otherwise stronger. Sometimes a transfer could be more harmful than

[70] A.I.R. 1966 S.C. 447 [72] A.I.R. 1957 S.C. 908

[71] A.I.R. 1956 S.C. 1987 [73] A.I.R. 1974, S.C. 2192

punishment and disciplinary control by the High Court can also be stultified by and appellate jurisdiction being vested in Government over the High Court's administrative orders.

Article 235 of the constitution has been construed by the Supreme Court to mean that the subordinate judiciary is within the control of the High Court and this control has been given to the High Court so as to make the subordinate judiciary independent of the executive-a major litigant. The control thus vested in the High Court also includes the making of transfers of the subordinate Judges and this control is given to the High Court by the constitution in order to avoid executive interference. Then how can it be accepted that the provision of Article 222(1) of the constitution is in the nature of conditions of service so that a High Court Judge can be transferred by the executive - a major litigant. To accept the interpretation of Article 222(1) as advanced by Mr. Raman, leads to the situation that the High Court Judges are to be treated as if in normal administrative service but this is quite oppose to the scheme of the constitution relating to the judiciary and cannot evidently be accepted.

84. Therefore, to summaries, the scheme of the constitution as disclosed by Articles 50, 214 to 284A, 229, 233, 234, 235 and Schedule 111, form a and Clause (11) of Part D, is clearly that the

principle of judicial separation from executive is recognised in the Constitution and in the aforesaid context and the historical back-ground the word "transfer" used in Article 222(1) and Article 217, Clause (1) proviso (a) means an "appointment by transfer" and the consent of the Judge to be transferred has to be taken because what is envisaged under Article 222(1) is appointment of a Judge.

85. Much was said and discussed about the scope of word "consultation" as used in Article 222(1) of the constitution. What is the meaning of word, "consultation"? The word "consultation" is in juxtaposition mandatory and means an effective or substantial consultation. It is not merely a formality, it must not be received with ill grace or rejected out of hand, Vide *State of U.P. v. Manbodhan Lal Srivastava*[74], and Ranga Muhmmad's case (supra). The word "consultation" does' not mean concurrence; it does not mean control, it means advice. In manbodhan Lal Srivastava's case (supra) while interpreting the word 'consultation" as used in Article 320(c) of the constitution, the Supreme Court observed that "the requirement of consultation with the commission do not extend to making the advice of the commission on those matters binding on the Government". But at the same time it was observed that "it is not merely a formality". In *Chandramouleshwar Prasad v. The Patna High Court and Ors*[75]., while interpreting the word consultation as used in Article 233 of the constitution the Court observed:

> 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 this does not mean that the governor must accept whatever advise 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

[74]1958 SCR 533

[75] A.I.R. 1970 S.C. 370

> the choice of promotion is to be limited.The question again came up before the Supreme Court in *Jyoti Prakash Mitter v. The Hon'ble Mr. Justice N.K. Base Chief Justice of The High Court, Calcutta and Anr*[76]., In this case the court interpreting the provisions of Article 217(3) (unamended) of the constitution, where the word "consultation" occurred, observed:
>
> It is thus clear that while leaving the decision of the relevant question to the president the parliament thought it necessary to provide that having regard to the gravity of the problem covered by the said provision, it is essential that the president should have the assistance of the advice given by the Chief Justice of India Under Article 217(3) the President should, and we have no doubt that he will, in every case consult the Chief Justice of India as to whether a complaint received in respect of the age of a sitting Judge of any High Court should be investigated, and it is with such consultation that he should decide whether the complaint should be further investigated and a decision reached on the point.
>
> So also in *Union of India v. Jyoti Prakash Mitter* [77]held:

The argument that there was no consultation between the Chief Justice of India and the president is also without substance. Consultation contemplated by the constitutions is not a dialogue. Under Article 217(3) the president is required to consult the Chief Justice of India before determining the question as to the age of a judgment of the High Court. The President must before deciding the age of a Judge under Article 217(3) obtain the advice of the Chief Justice of India. For obtaining that advice the president undoubtedly must make available all the evidence in his possession of the Chief Justice of India the Chief Justice has to submit his advice to the president on that evidence it is not a condition of the validity of the decision by the president that the president and the Chief Justice should meet and discuss across a table the pros and cons of the proposed Action, or the value to be attached to any piece of evidence laid before the president and made available to the Chief Justice.

In Samsher Singh's case (supra), the Supreme Court has to consider how the president and governor has to discharge their constitutional duties and Krishna Iyer J. Speaking for himself and Bhagwati J. Observed:

In the light of the scheme of the constitution we have already referred to, it is doubtful whether such an interpretation as to the personal satisfaction of the president is correct. We are of the view that the president means, for all practical purposes, the Minister or the council of ministers as the case may be, and his opinion, 'satisfaction or decision is constitutionally secured when his ministers arrive at such opinion, satisfaction or decision. The independence of judiciary, which is a cardinal principle of the constitution and has been relied on to justify the deviation, is guarded by the relevant article making consultation with the Chief Justice of India obligatory. In all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India and the court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his

[76] A.I.R. 1965 S.C. 961

[77] A.I.R. 1971 S.C. 1001 SC

advice being ordinarily regarded as prompted by oblique considerations vitiating the order. In this view it is immaterial whether the president or the Prime Minister or the Minister for justice formally decides the issue.

To my mind the law laid down in these; cases is uniform, there is no divergence on the points. Krishna Iyer J. In Samsher Singh's case (supra) emphasised the force of advice given by the authority when there is a constitutional obligation to Act on consultation. If the president or the Government does not accept the judicial advice the rejection of the advice would ordinarily be recorded as prompted by oblique consideration vitiating the order. The scope of the word "consultation" is thus clearly declared by the Supreme Court and such declaration of law is binding on this Court. The power conferred under Article 222(1) is made subject to the Consultation with the Chief Justice of India. The Chief Justice of India is required to be consulted as he heads the highest court in the country and

> is thus better situated to advice and thus assist the president on various points which may arise for consideration if the power under Article 222(1) has to be exercised. This provision is introduced also to empower the Chief Justice of India to object if in his of union voluntary transfers under Article 222(1) are against public interest. Appointment by transfer is bound to seriously affect a Judge. The order of transfer also affects two federal units, namely two High Courts and two states. Many factors are required to be taken in consideration. Many problems are required to be tackled so that the power may be properly exercised transfer may result in public injuries, e.g., due to want of knowledge of a Judge of the local laws, customs, the regional language, etc. it may cause administrative difficulties which may ensue if the Chief Justice is transferred. It may also cause individual injuries to the Judge to be transferred, namely, education of the children, social difficulties or obligations due to the fact that the wife may be serving or old parent who needs his personal attendance or special medical facilities, residential accommodation on retirement etc, in order that consultation be substantial such procedure which would enable these injuries to be effectively considered must be evolved so that the highly placed individuals may exercise their power and judgment for the purpose for which it is to be exercised. The president may prescribe a procedure to achieve the end but it must be an effective and which carries out the real purpose underlying the article.

86. The next question argued at length at the bar is whether the principle of promissory estoppel is attracted in the present case. The provisions of Article 222(1) of the constitution give discretion to the president to transfer and are not mandatory in form. There is no dispute on this point as the article is clear. The power thus conferred is discretionary and the discretion has to be exercised honestly and not arbitrarily, reasonably and without any bias. Under Article 222(1) power is given to transfer a High Court Judge but this power is not unfettered. The consultation of the Chief Justice of India is a condition precedent to the exercise of the power there under. The power has to be exercised for the purpose for which it is granted. The next question is what is promissory estoppel? This principle was enunciated by lord denning in *The Central London Property Trust ltd. v. High Trees Houses Ltd*[78] and summarized by him in *Evenden v. Guildford City Association Football Club Ltd*[79]. as under:

[78](1947) K.B. 130

[79]1975 (1) Q.B. 917

> Mr. Reynolds referred us, however, to spencer bower and turner, estoppel by representation, 2nd Ed. (1966), which suggests, at pp. 340-342, that promissory estoppel is limited to cases where parties are already bound contractually one to other. I do not think it is so limited: see *Durham Fancy Goods Ltd. v. Michael Jackson (Fancy Goods) Ltd*[80]. It applies whenever a representation is made, whether of fact or law, present or future, which is intended to be binding, intended to induce a person to Act upon it and he does Act upon it.This principle of promissory estoppel was considered by the Supreme Court in *The Union of India and Ors. v. Anglo Afghan Agencies etc*[81]. as under:
>
> We hold that the claim of the respondents is appropriately founded upon the equity which arises in their favor as a result of the representation made on behalf of the Union of India

in the export promotion scheme, and the Action taken by the respondents Acting upon the representation under the belief that the Government would carry out the representation made by it. On the facts proved in this case, no ground has been suggested before the court for exempting the Government from the equity arising out the Acts done by the exporters to their prejudice relying upon the representation. This principle has been recognised by the Courts in India and by the judicial committee of the privy council in several cases. In Municipal Corporation of *The City of Bombay v. Secretary of State*[82] it was held by the Bombay High Court that even though there is no formal contract as required by the statute the Government may be bound by a representation made by it....

Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen.

Again the said principle was considered in *Century Spinning & Manufacturing Co. Ltd. and Anr. v. The Ulhasnagar Municipal Council and Anr*[83]*.,* where the Court observed as under:

A representation of an existing fact must be distinguished from a representation that something will be done in future. The former may, if it amounts to a representation as to some fact alleged at the time to be actually in existence, raise an estoppel, if another person alters his position relying upon the representation. A representation that something will be done in future may involve an existing intention to Act in future in the manner represented. If the representation is Acted upon by another person it may, unless the statute governing the person making the representation provides otherwise, result in an agreement enforceable at law, if the statute requires that the agreement shall be in a certain form, no contract may result from the representation and Acting therefore but the law is not powerless to raise in appropriate case an equity against him to compel performance of the obligation arising out of his representation.

Public bodies are as much bound as private individuals to carry out representations of facts and promises made by them, relying on which other persons have altered their position, to their prejudice. The obligation arising against an individual out of his representation amounting to a promise may be enforced ex contract by a

[80](1968) 2 Q.B. 839 847 [82](1904) I.L.R. 29. Bom.580

[81] A.I.R. 1961 S.C. 718 [83] A.I.R. 1971 S.C. 1021

person who Acts upon the promise; when the law requires that a contract enforceable at law against a public body shall be in certain form or be executed in the manner prescribed by statute, the obligation may be enforced against it in appropriate cases in equity.

Once again the Supreme Court had to consider the said principle in *N. Ramanatha Filial v. The State of Kerala and Anr*[84]*.,* and the court observed:

In American Jurisprudence 2nd at page 783 paragraph 123 it is stated 'generally, a state is not subject to an estoppel to the same extent as is an individual or a private corporation. Otherwise, it might be rendered helpless to assert its powers in Government. Therefore as

a general rule the doctrine of estoppel will not be applied against the state in its Governmental, public or sovereign capacity. An exception however arises in the application of estoppel to the state where it is necessary to prevent fraud of manifest injustice.

This principle was again followed by the Supreme Court in Excise Commissioner, *U.P. Allahabad and Ors. v. Ram Kumar and Ors*[85]*.,* An argument was advanced that there is conflict or divergence with regard to the principle of promissory estoppel as enunciated in Anglo Afghan's case and Tug Century Spinning & Manufacturing Co. Ltd.'s case on one hand and Ramanath Pillai and Excise Commissioner's case (supra) on the other hand. It is not necessary to detail this argument in the present case for the reasons which follow. Now the plea and contention of promissory estoppel rest on the speech of the then Law Minister Shri A.K. Sen made by him in the parliament. The case of the petitioner is that he relied upon the representations made in the speech and acting upon the same accepted the post of a Judge of the High Court of Gujarat in the year 1969. The occasion on which the said speech was made by the Minister must be noticed. When the constitution was framed and passed by the constituent assembly, it contained Clause (2) to Article 222 of the constitution of India which was as under:

When a Judge has been or is so transferred, he shall, during the period he serves, as a judge of the other High Court, he entitled to receive in addition to his salary such compensatory allowance as may be determined by parliament by law and, until so determined, such compensatory allowance as the president may by order fix.

This clause was omitted by the 7th constitutional amendment which came into force on November 1, 1956. The said deleted Clause V as again re-introduced by 15th constitutional amendment. While moving the bill relating to 15th amendment, Shri A.K. Sen, the then law Minister made the following speech:

Shri A.K. Sen: then there was the question of transfer of Judges. I think there has been criticism from all sides from opposition groups that this provision was designed to coerce the Judge and to keep them in a state of perpetual fright. This argument completely ignores facts and history. The constitution itself contains a provision even now for transfer of Judges from one High Court to another without any compensatory allowance.

Shri Kasbi Ram Gupta: then, why make the change?

Shri A.K. Sen: if the Hon. Member will hold his soul in patience, he will certainly get the answer.

[84] A.I.R. 1973 S.C. 2641

[85] 1976(3) S.C.C. 540

And yet the history of the administration both here and in the states so far as it is concerned with the High Courts has proved that there has been no attempt to effect any transfer of Judges excepting with their consent, and the power today remains without any obligation to pay any compensatory allowance whatsoever. The reason for introducing a

provision for compensatory allowance was explained by me when the motion for reference to the joint committee was under consideration.

I said that we had accepted it as a principle that so far as High Court Judges were concerned, they should not be transferred excepting by consent. This convention has worked without fail during the last twelve years, and all transfers have been made not only with the consent of the transferees, but also in consultation with the Chief Justice of India.

Lok Sabha Debates, Vol. XVIII, 1963, April 25 to May 7, 4th Sessions Columns 13006-7....

As I said, though the power of the president to transfer a judge from one High Court to another was unfettered by convention we have never transferred a Judge without his consent, which explains a good deal the restraint with which these powers have been exercised, and completely negatives the unfounded charge that we have tried more or less to interfere with the judiciary, a charge which is so frequently and freely canvassed by persons who are possibly either ignorant of facts or do not like to know the facts.

The question is whether the Minister was making a statement of fact or any assurance was given by him that no High Court Judge would be transferred without his consent. The Ministers was defending the charge levied by the opposition that the provision was designed to coerce the Judges and to keep them in a state of perpetual fright'. The defense of the Minister was that no attempt was made to transfer a High Court Judge without his consent and this principle was accepted by the Government. He said that the principle had gained the force of convention and worked without fail during the last 12 years and transfers were made with the consent of the transferees. In short the Minister stated the practice that was followed on the basis of which the unfettered power of transfer under Article 222(1) of the constitution had been exercised by the Government and called the practice 'a convention' to emphasize his say. No doubt it is true that this statement was made by the responsible spokesman of the Government in the parliament but that was to refute the charge of executive interference with the judiciary. It is also true that the statement of fact can also be regarded as policy statement declaring how 'unfettered' power under Article 222(1) of the constitution as the spokes man said had been exercised by the Government. The Minister no doubt called this principle as a convention but with the qualification that the power of the president under Article 222(1) was unfettered. The statement of the Minister has to be read in its entirety. The said convention was not an obligatory one but indicated the practice. According to the Minister the power under Article 222(1) of the constitution was unfettered. The "convention" being not an obligatory one but mere practice cannot be regarded as giving any assurance so as to give rise to the principle of promissory estoppel. It was pointed out that practice had been followed but this practice was qualified by the statement that the power of the president under Article 222(1) was unfettered. It cannot, therefore, be said that a representation had been made to induce a person to Act upon it. No inducement therein was given to a person to accept a post of a High Court Judge. The statement relating to the practice was a

merely a statement of fact accompanied with the statement of law that the power of the president under the article was unfettered. There was no such representation therein so as to come within "an ace" of operating as a promissory estoppel. Such practice cannot be enforced in the court of law as it was indicated that the power under Article 222(1) of the president was unfettered. It is, therefore, not necessary to go into details of the pleadings in respect of promissory estoppel as the claim of promissory estoppel is based only on the aforesaid speech of the Minister made in parliament which did not as said herein before provide any representation or inducement as claimed by the petitioner.

87. Now this brings us to the question whether in the present case the power under Article 222 has been exercised for the purpose other than one for which it has been enacted. The allegations on this point are contained in paragraphs 13,14,15 and 16 of the petition. To summaries them they are:

(1) That the practice followed not to transfer High Court judges had been given a go-bye;
(2) That the want of knowledge on the part of the transferred judge of the regional language, local statutes, rules, orders, notifications and bye-laws would be handicaped and hamper the cause of justice as it would delay disposal of cases and also reduce the reputation of the Judge in the esteem of his brother Judges and litigating public;
(3) That the transferred judge will not be in a position to dispose of criminal cases as the Code of Criminal Procedure 1973 provides that criminal proceeding including judgment shall be in the language of the state a language which a transferred Judge may not know;
(4) That the sixteen Judges had been transferred not for the purpose of administration of justice but on account of independent objectivity and fearlessness shown by them while discharging their duty as they delivered judgments against the Government in important cases. One of the Judges who is transferred has only nine months to retire. It is averred that the aforesaid relevant factors were not considered when mass transfer orders of High Court Judges were issued by the president under Article 222(1) of the Constitution. Para 16 of the petition is more relevant and it is as under:
The petitioner further submits that the constitutional requirement of presidential consultation with the Chief Justice of India in the matter of transferring a High Court Judge from one state to another is not a formal or empty requirement. It is a matter of substance, when the president of India in the matter of compulsorily transferring a Judge from one High Court to another consults the Chief Justice of India, it is the duty of the Chief Justice of India to point out all consequences which such a transfer would produce - consequences which produce public as well as personal injury. It is his duty to point out whether such transfer would militate against public interest or serve them. The petitioner says that he is not aware and does not admit that The Hon'ble Chief Justice of India brought to the notice of the president of India the different types of public and personal injury which will be caused by the transfers and their effect on the administration of justice, independence of the judiciary and the rule of law or that he brought to the notice

of the president of India the personal and public injury which would be caused by the transfer of the petitioner and other Hon'ble Judges from the Gujarat High Court to the Andhra Pradesh High Court. The petitioner is not aware and does not admit that The Hon'ble the Chief Justice of India brought to the attention of the President of India the statements made on behalf of the Government of India in 1963 which are set out in para 6 above. In the event of its being submitted that The Hon'ble the Chief Justice of India had brought to all these factors to the attention of the president of India, the petitioner submits that disregard of the advice given from the head of the judiciary in India would in law be an exercise of power for a purpose for which the power was not conferred, and the order Ex. 'A' is void on that ground. Further, the consultation with The Hon'ble the Chief Justice of India was meant to be a se-feguard against even an individual transfer. It is respectfully submitted that in the present case there has been a mass transfer of judges and the safeguard has not thought it fit to convene a conference of the Chief Justices and Judges of the High Courts who are vitially concerned with independence of the judiciary and the proper administration of justice in order to ascertain the views of the judiciary and convey them to the president of India. In the premises set out above, The Hon'ble the Chief Justice of India has been joined as a party respondent to this petition as a proper party. No relief is claimed against him.

88. Reply to these allegations is to be found in paragraphs 13, 14, 15 and 16 of the affidavit-in-reply to quote:

The submissions in para 13 of the petition are neither relevant nor helpful and are essentially repetitive of the averments in earlier paragraphs which have already been traversed. The petitioner has imported a cartload of extraneous material in an endeavour to bypass the clear constitutional provision. Wherever the constitution has felt it necessary to provide for consultation it has specifically so provided. Article 222 in providing for consultation with the Chief Justice of India prior to an order of transfer, necessarily excludes any other kind of consultation or consent. The wisdom of the constitution makers in en-Acting Article 222 cannot be laid open to a collateral attack by the kind of argument the petitioner wishes to advance in his petition.

The contentions in para 14 of the petition are without merit. The alleged difficulties arising out of unfamiliarity with the local language are exaggerated and in any event have no bearing on the point in issue in the present writ petition. Judges from other states have served successfully and with distinction in courts whose local language they were not familiar with. I crave reference to a list (annexure) of such transferred Judges in the past to show how this argument of linguistic unfamiliarity is without any real basis. To quote at least a few significant instances, Justice K.S. Hedge from Mysore was transferred to Delhi and his unfamiliarity with Hindi cannot be said to have in any way effected his performance as a Judge. Equally Justice Das Gupta from Calcutta served with distinction in mysore, whose language is Kannada of which the learned Judge was quite innocent.

The argument in this para is therefore both futile and irrelevant.

The averments in para 15 are quite incorrect and are not germane to the case. The allegations that 16 Judges have been transferred on account of their independent objectivity and fearlessness' is unwarranted and carries with it an implication that the rest of the 349 High Court judges in the country do not possess these characteristics, an implication as unfair as it is baseless. To illustrate the baselessness of this everment, I crave leave to refer to this aspect through concrete instances at the time of hearing of this petition. Indeed some judges who have rendered judgment against Government in very important cases have not only not been transferred but have Actually been promoted. The everments in this paragraph are therefore without merit and are denied. The Chief Justice of India has been unncessarily impleaded in this petition and the reasons given therefore are not valid or correct.

The allegations made in para 16 of the petition are denied. I further submit that it is neither open to the petitioner to question or enquire, how and in what manner the President of India had consulted the Chief Justice of India before issuing orders of transfers to the various High Court Judges. It is submitted that there is no illegality involved.

The petitioner's reply to these pleadings is to be found in paragraphs R, S and T which are as follows:

With the reference to Sub-para (13) of the said para II, I repeat what I have said in para 13 of the application that the traverse in Sub-para (13) does not deal with the point to which the sub-para replies and the correctness of what is stated in the said sub-para (13) is denied.

With reference to sub-para (14) of said para II, and the suggestion there made that my submissions implied that other Judges did not deliver judgments with independence and objectivity is unwarranted. I say that no such implication can arise, for the judgments delivered by all the High Court Judges in India were delivered before the mass transfers when the policy of not transferring High Court Judges without their consent held sway. Therefore the exercise of the power of transfer in 1976 cannot affect the independence of judges who delivered judgments earlier. The deponent of the affidavit in the said Sub-para (15) cannot crave leave to refer to instances of promotion at the time of hearing of this petition. I say that if he proposes to rely on any instances the whole object of pleadings is to let the petitioner know the case he has to meet and I cannot plead to instances which are to be disclosed not to me but later to the Court. As and when those instances are relied upon and circumstances are stated on oath or on matters of which the Court can take judicial notice I reserve my right to deal with them. In this connection I may observe that the deponent in the said affidavit has nowhere stated that the 16 mass transfers are all the transfers that are to be made and that other mass transfers were not contemplated. Having regard to the unfettered and unbridled power claimed in the affidavit there is no reason to suppose that large scale transfers would not be made. But even confining oneself to the transfers already made the submissions made in my application are correct. I say that the

fact that one or two Judges who have decided a case against Government have been promoted would not obliterate the effect of the fact that Judges who delivered judgments against the Government and who have made such observations as the facts and circumstances and the law called for were not transferred because of their judgments. With further reference to the said sub-para (15) I deny that The Hon'ble the Chief Justice of India has been unnecessarily impleaded in this petition and I repeat the submissions I have made and the reasons I have given for impleading The Hon'ble the Chief Justice of India and I say that those submissions are correct. I deny the correctness of the submissions relating to The Hon'ble the Chief Justice of India in the said sub-para (15) of para 11.

With reference to sub-para (16) of the said para II, I deny the correctness of the submissions made therein and I repeat what I have said in my petition. Consultation with the Chief Justice of India is not a matter of form but of substance, and is one of the conditions precedent to the exercise of the power under Article 222(1).

89. The powers of the president under Article 222(1) of the constitution are not unfettered in the sense that the president can pass any order he likes. The consultation of the Chief Justice of India is a brake; a condition precedent. This consultation is not merely a formality. The power is conferred to achieve a purpose and power can be exercised only to achieve that purpose. The power has to be exercised reasonably and on sound reasons after considering the relevant factors and facts. The public and private injuries which an order of transfer of a High Court Judge may involve have to be considered, giving due weight to each factor before an order of transfer under Article 222(1) is passed. The petitioners has enlisted the public and personal injuries which have resulted because of the impugned order of his transfer and those are not denied but termed as irrelevant. The theory or principle of national integration is no answer to the every injury that results because of an order of transfer. The principle of national integration is an abstract proposition especially when the division of states is on linguistic bases and the High Courts are in such federal units or states and importance is given to regional languages instead of a common language. National integration is a very good concept but doubtful it is how it can be achieved by enforcing it alone in the judiciary and that too when the very basis or foundation as stated above is wanting. The question is, were all the relevant issues considered by the authorities mentioned in Article 222(1)? The petitioner has put in issue the public and private injuries detailed in the petition and questioned whether they were taken into account before the power under Article 222(1) was exercised in the present case.

90. The petitioner has come with a definite case that in effecting mass transfers of High Court Judges including his own, the power under Article 222(1) of the constitution has not been exercised for the purpose of the article. He has also set out material facts which are required to be noticed and considered before the power under Article 222(1) has to be exercised by the president and said that:

He is not aware and does not admit that The Hon'ble Chief Justice of India brought to the notice of the president of India different types of public and private injuries which would be caused by transfers.

It is further stated that nobody had asked the petitioner about the public or personal injuries that would result due to an order of transfer under Article 222(1), these allegations are not specifically denied by respondent No. 1, the Union of India, but a vague reply is given which is to be found in the affidavit in reply which is quoted above. The effect of this reply of respondent No. 1 is that the power under Article 222(1) of the constitution has been exercised and the petitioner has no locus standi to question the same. Ours is a democratic state governed by the rule of law. To the specific allegations that the power has not been exercised for the purpose of the article it is no answer to say that the power is exercised and the petitioner is not entitled to make any further inquiry in that connection. If the power is not exercised for the purpose of Article 222(1) of the constitution any order of transfer in pursuance of such arbitrary exercise of power is open to challenge in Court of Law. Such an Action is justiciable. The order of the transfer of the petitioner is justiciable as the allegations are made on affidavit supplying the necessary available materials on the basis of which such allegations can rest. It was contended by Mr. Raman, that the petitioner could not have personal knowledge of the facts on the basis of which the impugned order had been passed and the allegations of the petitioner on the point are merely surmises and conjecturers. It is difficult to accept this argument as it comes from the party who is in possession of all relevant facts. The petitioner has not merely made an allegation that the power under Article 222(1) of the constitution in the present case has not been exercised for the purpose of the article but has detailed materials and factors which are required to be considered before any order of transfer can be made under Article 222(1). The petitioner then said that these material factors had not at all been taken into account as per his knowledge. This is all that the petitioner can do. To ask the petitioner to produce documentary or oral evidence to support the allegations is to ask him to commit breach of the provisions of the Indian Official Secrets Act, 1923. The petitioner says that he is a law abiding citizen, cannot do such an Act, has not done any such Act. Nobody can force him to do such an Act else he will be an abettor in the crime. An argument which obliges a person to commit the breach of the provisions of law providing a penalty, is absurd, unjust and can be described as an Act of a drowning man catching a straw. Therefore, the argument of Mr. Raman that no documentary or oral evidence is produced by the petitioner to justify his allegations cannot prima facie be accepted as it is not possible for the petitioner to produce such documentary or oral evidence. The argument of Mr. Raman is one of avoidance of one's own duty. The Chief Justice of India has not taken any part in the proceeding except filing an appearance. In the circumstances of this case and the case made out by the petitioner in this petition a mere bare recital of consultation with the Chief Justice of India in the impugned order is not sufficient. Respondent No. 1, the Union of India, is in know of the facts and has specifically denied the allegations but merely has given a reply which is not

only vague but is no answer in law. The said respondent has special knowledge of all the necessary facts and, therefore, ought to have specifically denied the same or ought to have set out materials to justify the impugned order and then claim, if necessary privilege with regard to production of relevant documents.

91. The net result is that the allegations made by the petitioner that the impugned order has been passed for a collateral purpose remains uncontroverted and, therefore, evidently has to be accepted. The consequence is that the impugned order Ex. "A" has to be struck down as null and void as one having been passed for a collateral purpose.

92. The result, therefore, is that the impugned order Ex. A, dated May 27, 1976 of the transfer of the petitioner, as a Judge of the Andhra Pradesh' High Court is null and void on two grounds: the first is that the said order has been passed in violation of the provisions of Article 222(1) of the constitution; the second is that the said order is passed for a collateral purpose and the discretionary power under Article 222(1) of the constitution has been exercised arbitrary and unreasonably I, therefore agree with the final order passed by my learned brother J. B. Mehta, J.

D.A. Deai, J.

93. Questions of Fundamental importance vitally affecting the higher judiciary are raised in this petition, possibly first of its kind since the introduction, of the constitution and even concurrence in the final order necessitates a discussion of the reasons for concurrence.

94. Facts necessary for analysis and examination of the contentions canvassed in this petition have been set out in the judgment of J.B. Mehta, J. and, therefore, they need not be recapitulated here.

95. Mr. Seervai, Learned Counsel for the petitioner succinctly formulated three contentions which arise in this petition. They are:

(1) Whether upon a true construction of Article 222 of the constitution the transferor a High Court Judge can only be made with his consent after consultation with the Chief Justice of India?

(2) Whether the speech made by Shri A.K. Sen set out in para 6 of the petition constitutes promissory estoppel in respect of the petitioner who accepted the judgeship in 1969?

(3) Whether the power of the president under Article 222 is unfettered? What are the conditions for the exercise of this discretionary power? Have these conditions been fulfilled?

96. It may be stated that a preliminary objection was taken on behalf of the first respondent to this bench hearing this petition of the petitioner both my learned brothers have dealt with it and I fully agree with them in overruling this preliminary objection. I need not deal with it at length

suffice it to say that a responsible party like the Union of India should have desisted from the temptation of raising such a preliminary reaction entirely based on hearsay and rumour. Objection was based on a letter to which some Judges of this High Court including the Judges constituting the bench were signatories addressed to the second respondent in which. As said that they had expressed some opinion, on the questions young the contentions raised in this petition and that, therefore, they had either prejudged the matter or had made up their mind and therefore, first Respondent is not likely to get a fair trial and a just decision in the matter. A bias was thus attributed to the Judges constituting the bench. Even though we had no objection to the second respondent producing the letter, it was not produced. Mr. Raman, learned Additional Solicitor General, Frankly Stated that Union of India is not aware of the contents of the letter, so also, Mr. Seervai, Learned Counsel for the petitioner, stated that he was not aware of the contents of the letter. Second respondent, the receipt of the letter did not choose to produce the letter even though the signatories to the letter had stated in a minute of the court that they had no objection, if the second respondent desires to produce the letter. Therefore, the entire contention is based on conjectures and surmises which can hardly tantamount to saying that first respondent had a reasonable or real likelihood of bias. The objection lacks foundation on facts and conjecture or surmise cannot be allowed to come in the way of this bench constituted by the Chief Justice of this High Court in discharge of its duties. Therefore, the preliminary objection was overruled and we proceeded to hear the matter.

97. Developing the first contention, it was said that it would have three independent limbs. They are: (a) is independence of judiciary a basic or fundamental feature of our constitution? (b) if yes, does the transfer of a High Court judge, without his consent, undermine independence of judiciary? And (c) what is the effect of (a) and (b) on the construction of Article 222?

98. Article 222 provides for transfer of a Judge from one High Court to another. It reads as under:

> 222. (1) the president may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.
> (2) when a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by parliament by law and, until so determined, such compensatory allowance as the president may by order fix.
> Constitutional amendment in respect of Sub-article (2) of Article 222 may be briefly noted. When the constitution came into force on 26th January, 1950, sub-Article (2) in its present form found its place in the constitution. It provides for payment of compensatory allowance to a Judge who is transferred from one High Court to another. By Clause 14 of the Constitution (Seventh Amendment) Act, 1956, sub-Article (2) was deleted. Subsequently in 1963 by the Constitution (Fifteenth Amendment) Act, 1963, sub-Article (2) in its present form was introduced.

99. Question of construction of Article 222 has been raised on two submissions and unless they are answered in favour of the petitioner, question of construction of Article 222 would hardly arise. That is how two sub limbs were formulated and submitted for our consideration. It is therefore, necessary to examine the two sub limbs first.

100. Mr. Seervai contended with considerable vehemence that it is the basic postulate of the constitution that judiciary should be wholly Independent of executiveand that the founding fathers by various provisions India Act, 1935, deals with the High Courts. Section 220(2) provides for appointment of High Court Judge by His Majesty by warrant under the Royal Sign Manual and then proceeds to recite that he shall hold office until he attains the age of 60 years. There are two provisos which are pan materia with Article 217(1) provisos. This provision may be examined in the background of the provisions contained in Section 240 of the same Act, which provides that except as expressly provided by the Act, every person who is a member of a civil service of the crown in India or holds any civil post under the crown in India, holds office during His Majesty's pleasure. The non-obstentate clause in Section 240 'except as expressly provided by the Act' clearly takes within its sweep Section 220(2). The tenure of service of the High Court Judge is not at pleasure but for the period fixed by the Act, subject to the proviso which would mean that he is guaranteed continuance in service during good behaviour. Article 217 of the constitution almost re-enacts the same provision except for recognising historical change, namely, acquisition of independence reflected therein. And again to understand the full import of Article 217, it must be recalled that pleasure in the constitution, as interpreted by the Courts decisions have enshrined dependence of judiciary in the constitution. It is said that independence of judiciary is a basic or fundamental feature of the constitution. This submission was sought to be made good first by reference to the provisions of the Constitution concerning subordinate judiciary, by pointing out that the expression 'control of the High Court' in Article 235 as interpreted by the Supreme Court in its various decisions, ensures freedom of subordinate judiciary from the executive and secondly by guaranteeing by constitutional provisions the conditions of service of High Court judges, and Supreme Court Judges, which ensure their independence. It was then said that if the subordinate judiciary was to be made wholly free from the executive, could the higher judiciary be at a disadvantage, and in order to affirm that even higher judiciary must be so insulated as to be wholly free from executive interference, such a construction may be placed on Article 222 as would ensure or retain independence of judiciary, or at any rate, would not erode or corrode the same.

101. Article 235 vests 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, in the High Court, the content of this control has been the subject matter of few decisions. The control which is vested in the High Court is 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 punishment 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 opportunity of showing cause as required by clause (2) of Article 311, unless such opportunity is dispensed with by the Governor acting under provisos (b) and (e) to that clause. The High Court alone is entitled to hold enquiry in such case Vide *State of W.B. v. Nripendra Nath*[86], Even though the power to appoint district Judges vests in the governor, it has to be exercised in consultation with the High Court as provided in Article 233(1) in the case of those already in service of the state and in case of a person not already in the service of the union or state such as practising advocate, it has to be made on the recommendation of the High Court vide Article 233(2). In order to make control of the High Court effective even at the initial stage of entry, in *Chandra Mohan v. State of U.P.*[87] *A*it was held that High Court's opinion must be asked and consultation must be in respect of a specific candidate whom the governor ultimately appoints. The concept of Consultation in Article 233 was further expanded by treating it as mandatory meaning thereby that any violation of it would render the very promotion of a District Judge void, vide *State of Assam v. Ranga Mohamud*[88], In the last case the real controversy was with regard to the connotation of expression 'posting' in Article 233 in that whether it included 'transfer' of a District Judge

[86] A.I.R. 1966 S.C. 447 [88] A.I.R. 1967 S.C. 903

[87].I.R. 1966 S.C. 1987

and it was in terms held that the Government had no power to transfer a District Judge from one place to another, which view was reaffirmed in *Chandra Mauleshwar v. Patna High Court*[89], The reason that appealed to the court in reaching this conclusion apart from the meaning to be assigned to the word 'control' in Article 235 read in juxta-position with the the word 'posting' in Article 233 was succinctly brought about by Krishna Iyer J. In *Samsher Singh v. State of Punjab*[90], he observed that sometimes a transfer could be more harmful than punishment and disciplinary control by the High Court can also be stultified by an appellate jurisdiction being vested in Government over the High Court's administrative orders. The exclusion of executive interference with the subordinate judiciary i.e., grass-roots justice, can prove a teasing illusion if the control over them is vested in two masters viz the High Court and the Government, the latter being otherwise stronger' in the same judgment Ray C.J., speaking for himself and four other Judges, has also dwelt on this subject observing that it is indeed strange that the High Court which had control over the subordinate judiciary asked the Government to hold an enquiry through the vigilence department. The members of the subordinate judiciary are not only under the control of the High Court but are also under the care and custody of the High Court, the High Court failed to discharge the duty of preserving its control when it requested inquiry through director of vigilence and it was an Act of self abnegation. It is indeed true that by a process of interpretation of Articles 233, 234 and 235, except for initial entry and final exit, the subordinate judiciary has been brought under the care and custody of the High Court and this has been done with the avowed object namely to ensure their independence, to protect them against executive interference and to look to one master only, namely, the highest Court in the state the High Court.

Judicial independence of the subordinate judiciary is thus safely ensured.

102. As a next step, it was urged that there were various provisions in the constitution, which provided a clear pointer to the securing of independence of higher judiciary. With a view to making the argument purposive, reference was made to Act of settlement by which judges in united kingdom whose tenure was king's pleasure till the Act was altered into tenure during good behavior. Chapter ii in part of the Government of tenure is enacted in Article 310(1) which again opens with the non-obstinate clause 'except as expressly provided by the constitution'. Article 310(1) clearly enacts that every person who is a member of a defense service or of a civil service of the union or of an all India service or holds any post connected with defense or any civil post under the union, holds office during the pleasure of the president, and every person who is a member of a civil service of a state or holds any civil post under a state holds office during the pleasure of the governor of the state. Sub-article (2) of Article 310 provides for compensation in specified cases. But it appears that when service is terminated, either by the president or by the governor. Acting under Article 310 exercising the pleasure tenure, unless the case falls under Sub-article (2), no compensation can be claimed for such termination of service. It must be made distinctly clear that Article 310 is subject to Article 311 and the rules made under Article 309 and other statutory conditions of service, if any enacted. Undoubtedly, Judges of the High Court are guaranteed continuance in service up to the age constitutionally prescribed and can be removed on his voluntary Act of resignation or

[89] A.I.R. 1970 S.C. 370

[90]1974(2) S.C.C. 831

by process of impeachment and which when examined ensures a judicial procedure and the removal can be for physical unfitness or proved misbehavior. Once pleasure tenure is excluded in respect of High Court Judges, there is no master servant relationship. At any rate, Judges are not servants who can be given directions in discharge of their judicial functions. There is some controversy whether there can be any control of any 'authority over Judges of the High Court and it was said that the control of any one over a Judge of High Court is just inconceivable because once any such idea of control is imported, master-servant relationship creeps in and it would take within its sweep known principle that servant is bound to obey lawful orders of the master. I would examine the question of control little while later. Suffice it to say that there can never be any control over a High Court Judge in discharge of his judicial functions. It is difficult to contemplate such a situation; but for that matter, even though High Court has control over subordinate judiciary, it has administrative and disciplinary control and there is no control over subordinate judiciary when the latter discharges judicial functions. It must be made distinctly clear that no High Court Judge or for that matter even the High Court can direct the District Judge or Judges subordinate to the District Judge to do or not to do anything in discharge of his judicial functions. That is interference with judicial functions and may constitute contempt. Word 'control' does not necessarily connote master-servant relationship only so that servant may be directed to carry out lawful orders of the master. Members of subordinate judiciary are not

servants of the High Court. They are indisputably servants of the State Government. Dichotomy between administrative control and control over judicial functions must have always to be kept in view. In examing the question of control qua High Court Judges, administrative directions and control over judicial functions may be clearly kept apart from each other. Article 22(1) ensures salary as specified in Second Schedule of the Constitution to the Judge of the High Court and Sub-article (2) provides for leave, pension and other allowances which may be determined by or under law lie by parliament, and until so determined to such allowances and rights as are specified in the second schedule. Proviso to Article 221 guarantees continuance of conditions of service or not to alter the same to his disadvantage after a person enters upon his office as High Court Judge. This provision guarantees salary, leave, pension and other allowances to a High Court Judge and puts a fetter on the power of any one to alter the same to his disadvantage after he is appointed. And the provision contained in Article 202(3)(d) provides that the expenditure in respect of the salaries and allowance of Judges of any High Court shall be expenditure charged on the consolidated fund of the state. Article 203(1) provides that the expenditure which is charged upon the consolidated fund of a state shall not be subjected to the vote of the legislative assembly, meaning thereby that the High Court Judge is guaranteed his salary and allowances free from the control of legislative or popular vote. Article 211 forbids discussion in the legislature of a state with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties there is a similar fetter on the power of the parliament in fee corresponding Article 121. This was enacted with a view to granting immunity from political criticism of a Judge of the High Court in discharge of his duties, because such a criticism may tend to unnerve a Judge of High Court in discharge of his duties. Article 215 constitutes wish court to be a court of record with power of such a court lading the power to punish for contempt of itself. Articles 226 and 227 in their cumulative effect confer total jurisdiction in respect of Civil and Criminal Justice and Article 235 confers disciplinary jurisdiction over the subordinate judiciary. All these provisions were advisedly incorporated in the constitution and they ensure independence of judiciary from execute legislative and political influence or interference. It is in this context one' must appreciate the directive in Article 50 the goal set for state Action namely to separate judiciary from the executive and separation can only be effective if after separation judiciary is made free from direct or direct interference of the executive. Protection was to be given to the judiciary against such interference because in the words of Krishna Iyer J. Government which is a compendious term for executive is stronger than the High Court even the framers of the constitution took this aspect as axiomatic. While replying to the amendment to draft Article 103 about the conferment of power to appoint Judges of the Supreme Court, Dr. Ambedkar said :

> With regard to this matter. I quite agree that the point raised is of greatest importance. There can be no difference of opinion in the house that our judiciary must both be independent of the executive and must also be competent in itself. And the question is how these two objects could be secured.
> Sardar Vallabhbhai Patel said regarding appointment of High Court Judges that judiciary

should be above suspicion and should be above party influence. This shows that at least the framers of the constitution who were seasoned freedom fighters were absolutely clear in their mind that judiciary must be insulated against executive, legislative or political interference.

103. Having referred to the aforementioned provisions, it was very vehemently urged that independence of the judiciary is a basic or fundamental feature of our constitution vesting in the judiciary the judicial power of the state and even though there is no division of powers, as is to be found in the American constitution, but division of the three main functions of Government is recognised in our constitution. Judicial power in the sense of judicial power of the state is vested in the judiciary. Similarly executive and legislature are vested with powers in their respective spheres. Judicial power has lain in the hands of the judiciary prior to the Constitution and also since the constitution vide Ray C.J. In *Smt. Indira Nehru Gandhi v. Raj Narain*[91], If the three departments of the state are to discharge their respective functions and especially in the case of judiciary invested with the power of judicial review of administrative and legislative Action, which led to the formulation of doctrine of ultra vires, it should be totally free from any control directly or indirectly of the executive. There can not be any real and substantial independence of the judiciary unless Judge who enters his office, is guaranteed his basic conditions of service such as pay, pension, allowances leave etc. Not left subject to the vote of the legislature or executive fiat and which cannot be altered either by the executive or legislature to his disadvantage after he has entered his office. No Judge including the Judge of a High Court would be free in the true sense of the term unless it is ensured that the executive would not be able to inflict upon him by its Act hardship or injury in discharge of his duty. What the legislature could not do, executive could never be permitted to do. In fact it is not necessary to examine the question whether independence of judiciary is basic or cardinal feature of our constitution in view of the authoritative pronouncement on the subject in Samsher Singh Is case (supra). It reads as under:

The independence of the judiciary is a fighting faith of our founding document.

[91] A.I.R. 1975 S.C. 2299

Since the days of lord coke, judicial independence from executive control has been accomplished in England. The framers of our constitution impressed by this example, have fortified the cherished value of the rule of law by incorporating provisions to insulate the judicature. Justice becomes fair and free only if institutional immunity and autonomy are guaranteed (of course there are other dimensions to judicial independence which are important but irrelevant for the present discussion). The exclusion of executive interference with the subordinate judiciary, i.e., Grass-roots justice, can prove a teasing illusion if the control over them is vested in two masters, viz., the High Court and the Government, the latter being otherwise stronger. Sometimes a transfer could be more harmful than punishment and disciplinary control by the High Court can also be stultified by an appellate jurisdiction being vested, in Government over the High Court's

administrative orders. This constitutional perspective informed the framers of our constitution when they enacted the relevant Articles 233 to 237. Any interpretation of administrative jurisdiction of the High Court over its subordinate limbs must be aglow with the thought that separation of the executive from the judiciary is a cardinal principle of our constitution.

104. Add to this the fact that judicial review of Administrative Action is recognized as a basic feature of our constitution, and must, in order to be purposive and effective, of necessity guarantee the independence of judiciary. It would require no elaborate argument to reach an affirmative conclusion that independence of judiciary is the basic feature of our constitution.

105. The learned Additional Solicitor General however, said that it would be incorrect to examine the concepts like independence of judiciary or rule of law as something like a priori concepts but they must be examined in the light of the provisions of the constitution which recognize such concepts with the limitation the Constitution framers chose to put upon them. It was said that complete independence of judiciary could not be examined in the spirit of confrontation against executive or legislative interference which may erroneously lead to a concept of insulation, but it must be examined in the context of three arms of the Government, each working in correlation and harmony with other in their specified and prescribed jurisdiction. It is true that once we reject the theory of division of power and functions, there would be number of points of contact between one or the other arm, or one or other branch of the Government, say executive or judiciary. The question, however, is not whether they converge at a point or there are points of contract but the question is whether each one in its specified and demarcated area of functions and duties, is in a position to Act free from any interference from the other limb or arm of the Government. Undoubtedly, there would be points of contract such as are to be found in Articles 127 and 128 and several other articles referred to which would be examined a little while later more elaborately when the question of construction of Article 222 is examined. Suffice it to say that even though, there are points of contacts between executive and judiciary, yet it cannot be gainsaid that in order that the function of judicial review of both executive and legislative Action which is a basic feature of our constitution, is properly and courageously carried out by judiciary upon whom power of judicial review is conferred, it must be independent of any influence which would render judiciary ineffective, in discharge of its constitutional function of judicial review. It is, therefore, undeniable that independence of judiciary is a basic or fundamental feature of our constitution.

106. Next question is whether a transfer of a High Court judge without his consent undermines independence of judiciary. The constitution envisions setting up an egalitarian society and to translate its vision into reality, the state has assumed the role of social welfare state. Consequently, its functions have increased many-fold and touches the citizens at diverse points. Economic planning comprehending mixed economy with large reservation for public sector led to the consequent result of the State proliferating its activity in the world of commerce and

industry and planned economy further enlarges the state functions. We have thus moved far away from lassies-fair economic policy and indisputable result has been that the state is possibly the biggest litigant today. The writ jurisdiction conferred on the High Court and Supreme Court, the power of eminent domain, setting up of giant public sector undertakings, all these have contributed to making the state the biggest litigant in all courts and especially so in the High Court, with tax references, writ petitions, criminal appeals and large number of company matters. All these have invariably the state as one of the parties to the litigation. Unquestionably, the state is one of the biggest litigants.

107. For the purpose of considering whether the transfer of a High Court Judge without his consent would undermine the independence of judiciary, I may assume that the transfer would be ordered by the president under the advice of the ministry concerned, undoubtedly in consultation with the Chief Justice of India. The situation boils down to this that the state as the executive and which is a litigant in almost all matters except very few before a High Court Judge, has the power to transfer a Judge from one High Court to other High Court. Shorn of all embellishments, a party to a litigation has a power to transfer a Judge of the High Court and has claimed unfettered power necessarily without the consent of the Judge concerned to transfer him from one place to another place. How far a Judge who can be transferred from one place to other place, by a party to a litigation before him, would be able to maintain his independence qua that party in discharge of his judicial functions?

108. A tone stage, I was toying with an idea whether power in some one to transfer a High Court Judge without his consent would at all underline his judicial independence, which would more or less depend upon the judge himself. It is a personal factor. There are Judges, who would stand up to any threat of transfer, without in the slightest manner, impairing his judicial independence that is expected of him. In fact that must be a basic tenet of the Judge's philosophy. The question however is not of marginal individuals but of institutional immunity. It was rightly urged that the court should not examine the marginal cases of strength and or weakness but should examine the case from the point of view of an average Judge. High Court Judges are highly qualified. They do enjoy certain status. They are assured minimum decent conditions of service. It was considered highest honour to be invited to be a Judge of the High Court. With the fast changing values, the picture is basically different and even disturbing. Judicial service is not merely a form of service, it is a way of life aptly described by Winston Churchill as presenting a continuous aspect of dignity and conduct at once privileged and restricted. The office has to some extent suffered erosion of dignity and consequent devaluation. After all is said and done, the Judges are human beings with all the limitations to which flesh is heir to". Human nature as it is, it tends to settle down to certain way of life in certain environment. Transfer is uprooting from one place and being taken to an unknown, if not uncongenial atmosphere. In the words of learned Additional Solicitor General, it is a physical displacement from one Court to another Court. Judge has his social problems. Uprooting may have adverse effect not only on the Judge but his dependents. With the states wedded to the growth of regional languages, education of the

children of a transferred Judge is bound to suffer. His special problems such as marriage and settlement in life of children, is bound to be more difficult. Petitioner has described his private hardship on transfer which has remained practically uncontroverted save saying that it is not relevant to basic issue. The whole ecology of his existence undergoes a basic change. That is not peculiar to the petitioner, as such a situation will arise in the case of all Judges who are transferred. That some others have not challenged the transfer, does not permit an inference that they are not adversely affected. As a man grows old, he becomes more and more prone to stick on to his local environment and to his local atmosphere in society where he has relatives nearby and especially in the event of emergency, some one can run to his rescue. This is undeniable. Transfer, therefore, does cause hardship and inflict injury. Its money compensation is a poor substitute. In fact the provision for compensation impliedly concedes that transfer causes hardship and inflicts injury. Use of the expression 'compensation' clearly connotes infliction of injury, and compensation is a form of reparation in terms of money. In fact it was not seriously disputed that transfer is likely to cause some hardship and inflict injury and, therefore, even though provision for compensation was once deleted by the Constitution (Seventh Amendment) Act, it was reintroduced by the Constitution (Fifteenth Amendment) Act. If some one has power by its Act to cause hardship or inflict injury on. Some one else, the latter in relation to the former, may not be able to Act as a free agent. If the executive by transfer is in a position to cause hardship and inflict injury on a judge who in discharge of his judicial functions has to decide against the executive as and when necessary as part of his duty, realistically, it must be confessed that he is likely to shrink from that situation, if possible and that would interfere with his independence. A robust and strong minded Judge may ignore any such hardship or injury. But the criterion must be of a Judge who is willing to avoid hardship by Acting in certain manner qua certain party, and his judicial independence is likely to be undermined. It is not merely a distant possibility but distinct probability, which cannot be, human nature as it is, overlooked or ignored. This is judicially recognized by Krishna Iyer. J. When he observed that sometimes transfer could be more harmful than punishment Sawsher Singh's case (supra).

109. The next question then is to find out what is the effect of the conclusion that independence of judiciary is a basic or cardinal feature of our constitution and that transfer of a High Court Judge without his consent is likely to impair or undermine his judicial independence on the Construction of Article 222.

110. Article 222 provides for transfer of High Court Judges. It confers power on the President to Transfer a Judge of High Court from one High Court to any other High Court after consultation with the Chief Justice of India. Sub-article (2) of Article 222 provides for payment of compensation to a judge who is so transferred. Does language of Article 222 raise any question of construction? In other words, is there any ambiguity in any expression used in Article 222? It was said that two words in Article 222 are ambiguous, namely, word 'Judge' and the word 'transfer'. Does the word 'Judge' signify only permanent Judge or it includes Acting or additional Judge, because if it does include Acting or Additional Judge, different consideration would arise,

if he is to be transferred in view of provision contained in Article 224(1). Transfer of permanent Judge can only be ordered in public interest and in this case, the respondents say that in order to achieve public interest of national integration and strengthening of the judiciary, transfer of the petitioner and several other Judges is ordered. Those considerations may not arise if Acting or additional Judge is required to be transferred because their appointment could be made if the conditions prescribed in Article 224(1) are satisfied, namely, temporary increase in the business of High Court or by reason of arrears or by reason of arrears of work therein. It was also said that the word 'transfer' is ambiguous because, does it mean transfer as a measure of punishment, or a transfer in exercise of control, meaning transfer simplicities, or the word 'transfer' has some other connotation. Language of Article 222 in my opinion is clear and unambiguous. The word 'Judge' may include both permanent Judge, or Acting Judge or additional Judge and while transferring him relevant considerations have to be kept in view. It cannot, be said that word 'Judge' is ambiguous or presents any difficulty in construction of Article 222 'transfer' has always been understood to mean transfer from one place to another, or transfer from one post to another post and even promotion may involve transfer. But it connotes physical displacement. It was however said that even though word 'transfer' is not used in Articles 233 to 236, yet in Ranga Mohammad's case (supra) word 'posting' in Article 233 was interpreted in the context of the control over the District Judges conferred on the High Court under Article 233 not to include transfer and that power to transfer was treated as integral part of the power of control of the High Court under Article 235 and that if this construction was to be accepted, a literal interpretation of the word 'transfer' would connote control of executive over the judiciary which would be contrary to the fundamental feature of the Constitution. Therefore, the word 'transfer' calls for construction as there is ambiguity about it and this ambiguity can only be removed by reading the expression 'transfer' being qualified by the expression 'transfer with consent'. This submission of control is being separately examined. Suffice it to say that on the face of it, Article 222(1) does not present any difficulty. It confers a discretionary power on the President, the highest executive in the country, to transfer a Judge of High Court from one High Court to another High Court. There is in-built limitation on the exercise of this power, namely, that it can be exercised in consultation with the Chief Justice of India that is the highest judicial officer and pater families of the judiciary and person to be transferred is a Judge of the High Court and is to be transferred from one High Court to other High Court. Sub-Article (2) takes note of the fact that such a transfer is likely to cause hardship and inflict injury and attempt has been made to repair the injury by monetary compensation. Quantum of the compensation is to be determined by an Act of the parliament or until so determined, by the president.

111. It is at this stage necessary to examine briefly whether the power to transfer conferred by Article 222 on the president vests in the executive or it was a function of the president in which he Acts on his own and not on the advice of the Minister or even the Prime Minister. There was not much controversy on this point between the parties. It was specifically raised because it may not be said that in exercising power conferred by Article 222, the President may Act on his own and not on the advice of the ministry. It was in fact urged to clear the ground for the submission

that power to transfer a High Court Judge having been conferred by Article 222 on the president and it was to be exercised by him on the advice of the Minister and, therefore, transfer of the Judge could be by the executive and it would undermine independence of judiciary. Since the decision in Samsher Singh's case (supra), it must be taken as well settled that the president in discharge of his executive functions Acts on the advice of the council of ministers with the Prime Minister at the head. He is a formal constitutional head and must Act with the aid and advice of the council of ministers except where contrary provision is made in the constitution. It is more succinctly brought out by Krishna Iyer J., in his concurring judgment, to quote:

> We declare the law of this branch of our constitution to be that the president and Government, custodians of all executive and other powers under various articles shall, by virtue of these provisions exercise their formal constitutional powers only upon and in accordance with the advice of their ministers save in a few well-known exceptional situations.
>
> It would follow as a necessary corollary that the power to transfer a Judge would be exercised by the president on the advice of the Minister. Confusion that the president is going to be advised by two branches namely executive and the Chief Justice of India when consulted and that president may be torn between two conflicting advices stems from lack of understanding of functions of two sources one of advice and one of consultation. President is required to Act on the advice of the executive which necessary means that the proposal to transfer would emanate from the concerned branch of the executive and the president has thereafter to consult the Chief Justice of idle. When I come to the content of consultation envisaged by Article 222, I would point out that consultation being a matter of substance and not of form, the view expressed by the Chief Justice must ordinarily prevail. And the conflict has to be resolved keeping in view the fundamental fact that Chief Justice of India is best suited to have a final word in such matters vitally affecting judiciary. Suffice it to say at this stage that it is not possible to conceive the situation where the president would be torn between conflicting advices pointing in two opposite directions. But once it is held that president is the constitutional head, and is the custodian of all executive and other powers, he is required to Act or exercise the same in accordance with the advice of the ministers, the conclusion cannot be escaped that the transfer of the High Court Judge under Article 222 would be by the executive and earlier the conclusion is reached that such a transfer in all probability is likely to undermine the independence of judiciary.

112. Examining the submission about control, it was said that there is at this stage some control of the executive over the judiciary and it cannot be said that there is no such control. In support, attention was invited to some provisions of the High Court Judges Conditions of Service Act, 1954 and analogous statute with respect to Judges of the Supreme Court. After referring to some of the provisions, it was pointed out that leave has to be asked for and has to be sanctioned by the governor in one case and the president in another case. It was said that pension has to be granted

by the president. Reference was also made to Articles 127 and 128 of the constitution, and an argument was spelt out that apart from control in the sense of disciplinary control there is some control even over the higher judiciary to be exercised by such highly placed officers of the executive as the governor or the President, as the case may be. Leaving aside the question of administrative control, there can never be any control of any authority over the High Court Judge in discharge of his judicial function. That very suggestion runs counter to the role and function of a Judge. For that matter, there can never be any control over even a Judge belonging to subordinate judiciary. Administrative arrangements do not spell out control either disciplinary or administrative over judicial functions. Therefore, the suggestion that there is some control which may help in understanding the content of power conferred by Article 222 cannot be entertained.

113. It was urged that once it is held that transfer of a High Court Judge is by executive, and that such a transfer simpliciter by the executive of a High Court Judge, would in all probability undermine the judicial independence, a clear case of construction of Article 222 arises. Now, before I dwell upon the question of construction, I would briefly refer to the relevant principles for construction of constitutional provisions.

114. The elementary rule of construction which is sometime called the golden rule is that the statute should be taken is a whole and consider it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the court that the intention could not have been to use them in their ordinary signification, and would justify the court in putting on" them some other signification, which, though less proper, is one which the Court thinks the words will bear Vide *River Wear Commissioners v. Adamson*[92] at p. 764. This golden rule is really a modification of the literal construction rule. The literal construction has in general, but prima facie preference. To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope and the object of the whole Act to consider according to lord coke: what was the law before the Act was passed; what was the mischief or defect for which the law had not provided; what remedy the parliament has appointed and the reason for remedy vide Heydones case as quoted in *R.M.D.C. v. Union of India Venkatarama Ayyar J*[93]*.,* Speaking for the Court affirmed this rule and stated that these factors or what are called aids to construction may assist in arriving at true construction of the word which is unambiguous. It was emphasized before us that the expression "prize competition" which came up for construction before the Supreme Court would on literal construction have taken within its sweep the competition in which success depends upon a substantial degree of skill and the other which depends on chance and yet by process of construction the Act was limited to apply to competition in which success depended on chance. But it must also be recalled that where the language is capable of more than one interpretation, the court ought to discard the literal meaning if it leads to unreasonable result and adopt that interpretation which leads to a reasonably practicable result. This rule is subject to another well recognized rule that where the enacting part of a statute is clear and unambiguous, it cannot be cut down by any external aid to construction such as reference to preamble, intendment of the

legislature etc. Vide *Attorney General v. Prince Ernest Augustus of Hanover*[94] As against this, the learned additional solicitor general drew oar attention to *G. Narayanaswami v. G. Pannerselve and Ors*[95]*.,* wherein it is observed that the courts should interpret in a broad and generous spirit the document which contains the fundamental law of the land or the basic principles of its Government. Nevertheless, the rule of "plain meaning" or "literal" interpretation, described in maxwell's interpretation of statutes as "the primary rule",

[92]1877-11 Appeal Cases 743 [94]1957 Appeal Cases 436 at p. 460

[93] AIR 1957 SC 628 [95](1972) 3 SCC 717

could not be altogether abandoned today in interpreting any document. It was further observed that the object of interpretation and of "construction" (which may be broader than "interpretation") is to discover the intention of the law-makers in every case. This object can, obviously be best achieved by first looking at the language used in the relevant provisions. Other methods of extracting the meaning can be resorted to only if the language used is contradictory, ambiguous, or leads really to absurd results. This is an elementary and basic rule of interpretation as well as of construction processes which, from the point of view of principles applied, coalesce and converge towards the common purpose of both which is to get at the real sense and meaning, so far as it may be reasonably possible to do this of what is found laid down. Reference was also invited to *Kanai Lal Sur v. Paramnidhi Sadhukhan,*[96] *A*it is observed that the first and primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself. If the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act". It was emphasized before us. That attempt must be to adopt rule of harmonious construction which means that when there are in enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both. This is what is known as the rule of harmonious construction. Vide *Venkataramana Devaru v. State of Mysore*[97]*,* It was further said that where the provision or words in provision are not susceptible of two interpretations one need not import ambiguity so as to call in aid external evidence for construction. Reliance was placed on the observations of the Supreme Court in *Anandji Haridas and Co. v. Engg. Mazdoor Sangh*[98]*,* wherein it was clearly observed that as a general principle of interpretation, where the words of a statute are plain, precise and unambiguous, the intention of the legislature is to be gathered from the language of the statute itself and no external evidence such as parliamentary debates, reports of the committees of the legislature or even the statement made by the Minister on the introduction of a measure or by the framers of the Act is admissible to construe those words. It is only where a statute is not exhaustive or where its language is ambiguous, uncertain, clouded or susceptible of more than one meaning or shades of meaning, that external evidence as to the evils, if any, which the statute was intended to remedy, or of the circumstances which led to the passing of the statute may be looked into for the purpose of ascertaining the object which the legislature had in view in using the words in question.

115. Before we adopt the correct rule of construction let us keep in mind the important fact that we are called upon to consider the provisions in the constitution being the fundamental law of the

land. Constitution, generally speaking, is a document which is made for generations to come, interpretation of its provisions, must be predicated upon the principles for expanding future. We must always bear in mind that it is the Constitution, we are expounding. Rule of harmonious construction in the construction of various provisions of Constitution should ordinarily be adopted and from this it follows as a corollary that putting certain construction on one part of our constitution, would defeat the provisions in another part of the Constitution, such construction should be adopted as to make both the parts, meaningful. In this process, it may be necessary to enlarge the power, conferred by one provision or restrict the power so that other provision in other

[96] I.R. 1957 S.C. 907 [98] (1975) 3 S.C.C. 862

[97] A.I.R. 1958 S.C. 255

part of the constitution may stand in harmony with it. If the provisions of the Constitution in one part would be defeated by so interpreting the provision in another part, limitation must be read in the power or provision conferring power contained in another part of the Constitution. And viewed from this angle, the question of Construction of Article 222 would arise because if by reference to various provisions hereinbefore set out, an affirmative conclusion is reached that independence of judiciary is the cardinal or basic feature of the Constitution and if it is further held that a transfer of high Court Judge, without his consent, is in all probability likely to undermine his judicial independence and that the power to transfer is conferred on the executive, a clear case for construction of the provision contained in Article 222 arises.

116. Approaching the matter from this angle, unless one holds that power conferred by Article 222 is unfettered, as was claimed on behalf of the Government of India, some limitation on power will have to be read in Article 222 Mr. Seervai wanted us to read limitation that the word 'transfer' must be qualified by expression 'with his consent' and that would so limit the power as to make it consistent and bring it in harmony with other provisions of the constitution ensuring independence of judiciary. Is the power to transfer unfettered, or without any limitation to make it necessary to read down the article by reading a limitation on power to immunize the judiciary against executive interference as contended for by Mr. Seervai. If it is necessary to put a limitation on power, would it be correct to introduce the limitation by reading words 'with his consent' so as to denude the power to the extent that the article becomes meaningless or redundant.

117. It is claimed by the first respondent that the power to transfer conferred on the president is unfettered. That is not wholly true. Power to transfer is undoubtedly conferred on the president; but it is hedged in with a limitation that it can only be done in consultation with the Chief Justice of India. President is the top-most head of the executive. So also the Chief Justice is the highest post in judiciary in this country. Power to transfer is conferred on the highest executive and it is to be exercised in consultation with the officer at the top of the judiciary. If this consultation is meaningful and substantial, there is clear fetter on the power of the president. The judiciary for protection and safeguarding of its independence cannot look to any one better than the Chief Justice of India. There is no better authority and there is conceivably none except the Chief

Justice of India to whom even the higher judiciary can look forward for protection of its independence and for maintenance of its dignity. And it is this highest judicial officer who is to be consulted before transfer of a High Court Judge can be ordered from one High Court to another High Court. What this consultation must be, I would presently examine when I come to the third submission of Mr. Seervai. Suffice it to say that this consultation has to be meaningful and substantial so as to avoid weapon of transfer being utilized by the executive against an inconvenient Judge as a weapon of punishment, as a weapon of torture which would certainly undermine the independence of judiciary.

118. Now, if the power is not unfettered, and there is a fetter on the power, namely, consultation with the Chief Justice of India, is it necessary to read further limitation on the power so as to immunize judiciary from executive interference? Mr. Seervai said that read into the article 'with his consent' as further limitation on the power, and like any other power, it can be used in public interest; and public interest safeguard with suggested limitation on power would ensure independence of judiciary which was the cardinal faith of the founding fathers. In order to read this limitation, we will have to rewrite the article. I shall read the article as suggested by Mr. Seervai. "the president after consultation with the Chief Justice of India, transfer a Judge with his consent from one High Court to another High Court". The power conferred by Article 222 is the power to transfer. The moment such power can be exercised with the consent of the person to be transferred, the power is reduced to a request, and request is always liable to be rejected. It is a discretionary power conferred on the President. The President is not bound to transfer. He may transfer. But suppose he decided to transfer a Judge and he consults the Chief Justice of India, who, after examining all the pros and cons and taking into consideration the purpose for which power is exercised in public interest, agrees with the proposal. And thereafter the concerned Judge is approached with a proposal that he may consent to his transfer and virtually such a Judge would negate the proposal. What becomes of the proposal for transfer which was necessary in public interest. The power ceased to be power and it becomes a request liable to be rejected at the instance of the person who is to be transferred. Transfer of a Judge will have to be in public interest. It cannot be at the whim or fancy of someone. Respondents say that transfers were in public interest, namely, national integration and strengthening of judiciary.

119. How national integration is to be achieved by transferring one Judge from one High Court to another High Court, is really a debatable question. In fact injury caused by a transfer may in the ultimate analysis overwhelm the public interest, namely, of national integration sought to be achieved by transfer. Fanaticism with which regional language is fast replacing English in law Courts, though at the High Court level, english is retained, it would be difficult for a Judge, transferred to a state where regional language is different from his native state, to clearly grasp the relevant documents on which decision may have to be based, local laws with local background and local fervour may sometime ellude the Judge's proper handling. Rules and bye-laws are more often published in regional language. If the transferee Judge is the Chief Justice, he may not be able to provide leadership to the whole court and if he has always to depend upon

his colleagues for the discharge of his duties, his authority is likely to be undermined. These are some of the public injuries raised by the petitioner and which have not been seriously controverted except saying that these are hardly relevant to the question of considerable importance raised in the petition.

120. It cannot be gainsaid that transfer of a High Court Judge must be in public interest. National integration may be one such public interest. Strengthening of judiciary may also be another public interest. Unquestionably, transfer has to be in public interest. A transfer of a Judge may become a compelling necessity. How should it be achieved if it can only be with consent of the Judge concerned. It was of course said that High Court Judge is a broad minded person imbued with the idea of rendering public service, a dedicated individual and would appreciate the purpose behind the request and would ordinarily agree. However, human nature as it is, no one wants to be uprooted from familiar surroundings to be cast away from the main stream of life. And if he had all such characteristics, question of his transfer would not arise. I specifically asked Mr. Seervai, taking cue from his sir Chimanlal Setalwad lecture titled "tipping the scales" where he refers to 'reigning favourites that there is a Judge in the High Court. He is a very competent Judge. But he has developed certain local angularities, which have vitiated the Court's atmosphere. He is a good Judge and the drawback is not so grave, as to call for his impeachment; what was required was to free him from local peculiar undesirable influence. Would not his transfer solve the problem to the satisfaction of all? He was asked whether he would not mind being transferred. He candidly said 'no'. How is the problem to be solved? Transfer of such a Judge is in public interest, cannot be gainsaid. He is not willing to be transferred, and he would not give his consent. If the power to transfer is further limited by reading into Article 222 the words 'with his consent', by process of interpretation, Article 222 becomes a constitutional deadwood. He cannot be transferred. He cannot be continued at that place, and there is no tangible sufficient proof for impeachment. Law Commission in its Fourteenth report Vol. I.P. 99 rejected a transferable cadre of High Court Judges. But Mr. Seervai in his lecture observed that the commission did not consider separately whether the power to transfer a Judge would not in the last resort be used as a remedy for an admitted evil (p. 118). Then there must be power in some one to transfer the Judge albeit without his consent. And if we read down the article as suggested, there is no way out. Mr. Seervai said that the resultant situation is that there are two public interests in the field, and they appear to be in conflict with each other, to with transfer of a Judge without his consent by a litigant, namely, executive would undermine judicial independence, which is a cardinal feature of the constitution; and (ii) image of dame justice would be tarnished unless the judge is transferred so as to save him from the undesirable environmental influence affecting his integrity. The answer is that the Court, in such a situation, must determine the dominant public interest, and give precedence to it over the conflicting subservient interest which must give way. Said Mr. Seervai, tolerate the situation rather than undermine judicial independence by compulsory transfer by the executive. It often happens that the principles when pushed to logical end lead to two irreconcilable positions. In such a conflict, choice has to be made. Cardoza in his nature of judicial process (page 40-41) vividly describes

this conflict by saying that force of logic of one should prevail over the other, and the choice is made by the judicial mind born of its conviction that the one to be selected would lead to justice. In the end, the principle which is thought to be most fundamental to represent the larger and deeper social interests, must put its competitors to flight. Approaching from this angle, he said, if you cannot impeach the Judge, tolerate, but you cannot transfer him without his consent, because that would impinge upon the higher public interest, namely, independence of judiciary and would nullify the cardinal feature of the Constitution.

121. This conflict is more apparent than real. As the Article 222(1) stands, a Judge can be transferred only after consultation with the Chief Justice, who would take into consideration all relevant facts, including the public and private injury involved in the transfer and after weighing into the balance such injuries in one scale and transfer in public interest in other scale, determine which way the balance tilts and opine accordingly. But by reading into the article the words "with his consent" so as to put a further shackle or limitation or fetter on power would have the effect of denuding the article of any meaning. There is no known canon of construction, which permits reading down an article as to denude it of any meaning. To read into the Article 222 the words 'with his consent' would render the article denuded of any meaning. To slightly misquote willys on constitutional law, the provisions designed to meet fugitive exigencies have to be viewed not in vacuo but in the frame work of present day conditions as revealed by the social sciences and the demands of consumers of judicial service. Content of constitutional immunities is not consistent but varies from age to age. Now, in the affidavit-in-reply, it has been in terms stated that the views were expressed all over India from various sections of public, urging the Government to effect all India transfers of High Court Judges, which, according to them, would be in the larger interest of the higher judiciary and litigating public in this country. Situation does arise where instead of taking extreme course of impeaching a Judge, his transfer would be in his own interest and yet, he may not be willing to consent, so that, he may be impliedly deemed to have admitted what was said against him and the problem becomes intractable and no canon of construction permits to denude the constitutional provisions of any meaning.

122. It was further said that Article 222 may be read in the light of Article 217(1) and it would at once show that the word 'transfer' is used to mean appointment or appointment by transfer. In order to appreciate this contention, it may be recalled that the draft constitution did not contain any provision, similar to Article 222 and Article 217(1) was Article 193. In the draft Article 193(1), proviso (c) uses the word 'appointed' to any other High Court and not 'on transfer to any other High Court'. When the constitution was finally adopted, the word 'appointed' was omitted and 'transfer' was substituted. The draft constitution was sent to the Chief Justice of the federal court and a convention was called of the Chief Justices of High Courts in India to examine and opine on the judiciary provisions of the constitution. It was said that as Article 222 did not find its place in the draft constitution, the convention could not examine a possible provision for transfer. That would not be very correct, because draft Article 193 did contemplate transfer of a Judge from one High Court to another High Court, though the expression used was 'appointed to

High Court'. It was then said that the oath prescribed for a High Court Judge in third schedule read with Article 219 would clearly unravel the meaning of the word 'transfer' to mean 'appointed', because even when transferred, he has to take oath as Judge of the High Court to which he is transferred, meaning thereby, he is appointed. Article 217(1) provides for appointment of a High Court Judge. Appointment is to be made by the president after consultation with the Chief Justice of India, Governor of the state and in case of appointment of Judge other than the Chief Justice, the Chief Justice of the High Court. Clause (c) of the proviso to Sub-article (1) of Article 217 provides that the office of a Judge shall be vacated by his being appointed by the president to be a Judge of the Supreme Court or by his being transferred by the president to any other High Court within the Territory of India. Article 219 provides that every person appointed to be a Judge of a High Court shall, before he enters upon his office, make and subscribe before the governor of the state, or some person appointed in that behalf, by him, an oath or affirmation according to the form set out for the purpose in the third schedule. Submission is that if at the initial stage, a man cannot be appointed as a High Court Judge without his consent, and if a Judge of the High Court is to be appointed as a Judge of the Supreme Court, it cannot be done without his consent, it would necessarily imply that transfer constitutes fresh, if not first, appointment to another High Court and, ipso facto, it could not be done without his consent. This argument was sought to be repelled by saying that wherever consent is necessary, it has been so provided, to with Article 127(1) and 128 with its proviso. Some controversy centered round the meaning to be assigned to the expression 'request' in Article 127(1) and Article 128 and the question was whether if a Judge of the High Court was requested to attend a sitting of the Supreme Court as an ad-hoc judge, has he a right to refuse the appointment? After referring to the proviso to Article 128, it was submitted that where power to refuse or decline the offer is clearly envisaged, it has been specifically stated and, therefore, there is no right to refuse when request in the circumstances, adumbrated in Article 127(1) is made to High Court Judge. It is not necessary to resolve this dispute here, save and except saying that the word 'request' clearly implies a right to refuse. It cannot be explained away by merely saying that because a very high judicial officer like High Court Judge is being approached, decorous language is used in the relevant articles, because if there was anything in the submission, Article 217(1) should have used the same expression. Even the proviso to Article 128 does not carry the matter further because it merely makes explicit what is implicit in Article 127. It is however, true that where consent is expected, it is so provided. Further, even in draft Article 193(1) proviso (c) expression 'appointed' was used, but it was specifically substituted by the word 'transfer' when Article 217(1) was enacted. Simultaneously Article 222(1) was introduced conferring express power on the president to transfer Judge of the High Court. Therefore, it is not possible to say that word 'transfer' in Article 217(1) proviso (c) is used to mean 'appointment' which would bring within its sweep the prior consent and the right of refusal, and even though Article 222 was not in the draft Constitution, Article 193(1) in the draft Constitution, which is Article 217(1) in the constitution, clearly points in the direction of the transfer of a High Court Judge from one High Court to another High Court. Article 217(1) read with Article 219, therefore, would not assist in ranching the conclusion that Article 222(1) should be read with further limitation that transfer

can be with the consent of the Judge concerned. Therefore, having examined the first submission from all angles, it clearly appears that Article 222(1) itself contains the limitation on power of executive to transfer a High Court Judge, namely, consultation with the Chief Justice of India, which consultation is made effective by treating it as a matter of substance and which would ensure independence of judiciary. It is not necessary to read down the article by reading into it, the words 'with the consent' to make it a dead letter, denuded of any meaning, so as to reduce power of transfer to persuasion for transfer. By no canon of construction, the court can rewrite the article to make it a dead letter, useless and redundant. Therefore, the first submission of Mr. Seervai must be rejected.

123. Second contention canvassed on behalf of the petitioner is that the speech made by Mr. A.K. Sen, then law Minister of India, set out in para 6 of the petition, constitutes promissory estoppel in respect of the Judge who accepted judgeship in 1969. In paragraph 6 of the petition, part of the speech made by Mr. A.K. Sen then Law Minister of India has been set out in extenso. As the opening sentence began with some such sentence: "as I said that we had accepted it as a principle", further enquiry was made as to what was said earlier, and the meaning may be different, if the speech is read as a whole. In response to this query, earlier portion of the speech was handed in to us and it was said that the entire speech is relevant to the question, namely, transfer of High Court Judges. It was said that the speech sets out the declared policy adopted by the Government of India that transfer of High Court Judge is not to be made without his consent. The submission is that if the Law Minister of the Government of India, made a policy declaration on the floor of the parliament at a time when particular relevant question of transfer of High Court Judges was under discussion, saying that Government of India has accepted it as a principle, that the High Court Judge should not be transferred except with his consent, and that this convention has worked well without fail; and till the date of the making of the speech all the transfers have been made not only with the consent of the transferees but also in consultation with the Chief Justice of India, it would be a declaration of policy, concerning transfer of High Court Judges, affirmatively stating that they would never be transferred except with their consent and if Acting upon this policy statement, the petitioner accepted judgeship and altered his position to his detriment, it would constitute a promissory estoppel and any Action contrary thereto concerning the person who has Acted on the statement declaring policy and who has altered his position to his detriment, would be invalid.

124. First important question is whether against the express power contained in Article 222 of the constitution, enabling the president to transfer a Judge of the High Court, any statement made by the Minister on the floor of the parliament, would constitute promissory estoppel, in the sense that power could not be exercised, unless, a declaration in change of policy is made, and those who Act subsequent to that, cannot take the advantage of a policy which is abrogated.

125. 'Promissory estoppel' is of recent origin. It had its genesis when rigour of any law concerning contracts was required to be tempered with equity. But it was confined to cases where

legal relationship originated in contract. Lord Denning M.R. Said that when a promise made intended to create a legal relationship and which to the knowledge of the person making promise was going to be Acted on by the person to wino it was made, and which was in fact so acted upon, in such a case, the Court should see that the promise is honoured. It was not a case of estoppel stricto sensu, but it was a case of a promise intended to be Acted upon and intended to be binding and in fact acted upon, then one party, against whom the relief is sought, cannot be allowed to run away from it. This was the law deduced from the earlier decisions and then it was observed as under:

> I prefer to apply the principle that a promise intended to be binding intended to be Acted on and in fact Acted on, is binding, so far as its teras properly apply.
> Vide *Central London Properly Trust Ltd. v. High Trees House Ltd*[99]. This principle was recognised by house of Lords in *Tool Metal Co. v. Tungsten Electric Co*[100]. In a very recent decision in *Evenden v. Guildford City Association Football Club Ltd*[101]. the principle was examined, wherein the pertinent observation is as under:
> Mr. Reynolds referred us, however, to spencer bower and turner estoppel by representation 2nd ex. (1966), which suggests, at pp. 340-342, that promissory estoppel is limited to cases where parties are already bound contractually one to the other. I do not think it is so limited: see *Durham Fancy Goods Ltd. v. Micheel Jackson Fancy Goods Ltd*[102]. It applies whenever a representation, is made, whether of fact or law, present or future which is intended to be binding, intended to induce a person Act upon it and he does Act upon it. That is the case here. Mr. Evenden entered into his employment with the football club on the faith of the representation that he would not be prejudiced and that his employment should be regarded as a continuous employment. Acting upon it, he has lost any rights against the supporters' club. The football club cannot be allowed to go back on it. His employment is to be treated as continuos for the whole, 19 years. He is entitled to the full redundancy payment of 459.
> It was accordingly submitted that it could no more be said that the legal relationship on a representation being made which was intended to be Acted upon and was Acted upon, must originate in a contract so as to attract the application of

[99](1947) 1 K.B. 130 at p. 136 [101]1975 K.B. 917
[100]1955 2 All E.R. 256. [102](1968) 2 C.B. 839 847

> the doctrine of promissory estoppel or equitable estoppel. There is considerable
> force in this submission, because the facts in *Union of India v. Anglo Afghan Agencies*[103] clearly support this submission. In that case, the facts were that the textile Commissioner published a scheme called the export promotion scheme providing incentives to exporters of woollen goods. By the scheme as extended to export to afghanistan, the exporters were invited to get themselves registered with the textile Commissioner for exporting woollen goods and it was represented that the exporters will be entitled to import raw materials of

the total amount equal to 100 percent of the F.O.B. Value of the exports. Under Clause 10 of the Scheme, the Textile Commissioner had authority, if it was found that a fraudulent attempt was made to secure an import certificate in excess of the true value of the goods exported to reduce the import certificate. The petitioners contended that relying on the representation contained in the scheme, published by the Textile Commissioner, they exported to Afghanistan Woollen goods of the F.O.B. Value of Rs. 503471-73 p. and, therefore, they were entitled to obtain an import licence for an amount equal to 100 percent of the F.O.B. Value unless all goods fell under Clause 10, and it was nobody's case that the goods fell under Clauses 10. Upholding the contention of the petitioners, the Supreme Court observed as under:

We are unable to accede to the contention that the executive necessity releases the Government from honouring its solemn promises relying on which citizens have Acted to their detriment. Under our constitutional set up, no person may be deprived of his right or liberty except in due course of and by authority of law; if a member of the executive seeks to deprive a citizen of his right or liberty, otherwise than in exercise of power derived from the law-common or statue-the courts will be competent to, and indeed would be bound to, protect the rights of the aggrieved citizen.

At another stage, it was observed that under our jurisprudence the Government is not exempt from the liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the Judge of its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen. It should be at once made clear that when the exporter exported woollen goods on the strength of the representation contained in the export promotion scheme, the parties at that stage were not bound by any contractual relationship. Legal relationship arose out of the representation contained in the scheme which was intended to be Acted upon and was in fact Acted upon and by this conduct legal relationship came into existence which was held to be binding to both the parties and can be enforced at law. It, therefore, cannot be said that unless the parties are bound by contract, no question of promissory estoppel can be raised. The above case clearly establishes that principle. In *Turner Morrison and Co. Ltd. v. Hungerford Investment Ltd*[104]. Hegde J. (as he. Then was), said 'estoppel' is a rule of equity. That rule has gained new dimensions in recent years. A new class of estoppel i.e., Promissory estoppel

[103] A.I.R. 1968 S.C. 718

[104] A.I.R. 1952 S.C. 1311

has come to be recognized by the courts in India as well as in England. The full implication of 'promissory estoppel' is yet to be spelled out. After referring to High Trees case (supra) and *Robertson v. Minister of Pensions*[105] it was observed that the rule laid down in these decisions undoubtedly advances the cause of justice and hence the ratio should be accepted.

126. It was, however, contended that there can be no estoppel against the legislature nor can an express binding agreement fetter the legislative power. This legal submission was not decided. In fact this position is put beyond the pale of controversy by a clear exposition of law in *Jagannath Singh v. U.P*[106]. ratio of which decision was affirmed in the case of *Umeg Singh v. State of Bombay*[107] However corning down to the recent decision on this point in *State of Kerala v. G.R. Silk Mfg*[108]. the allegations were that the Government had by an agreement undertaken not to legislate for the acquisition of private forests for a period of 69 years, if the company purchased the forest lands for the purpose of its supply of raw materials and specifically subject to this agreement, the company had set up a plant for production of rayon plup. It was contended in that case that a clear case of promissory estoppel arose on the basis of which the company challenged the vires of the Kerala Private Forest (Vesting and Assignment) Act, 1971. The submission was that the state was estopped enacting such a measure which would violate the agreement. In other words, the agreement was not to exercise the legislative power which was admittedly vested in the state legislature. Negativing this contention, it was observed as under:

> We do not see how an agreement of the Government can preclude legislation on the subject. The High Court has rightly pointed out that the surrender by the Government of its legislative powers to be used for public good cannot avail the company or operate against the Government as equitable estoppel.
>
> It was however, contended that even, though it is true that there cannot be any binding agreement fettering the legislative power, exercise of the executive power stand on different footing and even in the case of legislative power, in a given context, promissory estoppel can be successfully pleaded. In *Century Spg. & Mfg. Co. v. Ulhasnagar Municipality*[109], the question arose whether the Municipality was estopped from levying octroi. The facts brought out in the case were the petitioner company and several other industrial units were set up in an industrial area. It was decided to set up a municipality including the industrial area and representations were made to exclude the industrial area from the municipal area. A notification excluding the industrial area was issued and the Municipality made a representation to the Government not to exclude the industrial area from within its jurisdiction. The Municipality agreed to exempt the existing factories set up in the industrial area from payment of octroi for a period of 7 years from the date of the levy of octroi and for exempting the new industrial units for a similar period from the date of the establishment. The Government acceded to the request of the municipality to retain the industrial area within the local limits of the municipality. The municipality subsequently passed a resolution to implement the agreement. A

[105](1949) 1 K.B. 227 [107](1955) 3 S.C.R. 164 [109] AIR 1971 S.C. 1021
[106]73 I.A. 123 [108] AIR 1973 S.C. 2734

> couple of years later, the successor municipality governed by the Maharashtra Municipalities Act, sought to levy octroi duty and to recover it from the company. The

company moved a petition under Article 226 of the constitution and it was dismissed in limine by the High Court. In appeal by special leave the Supreme Court relying on Anglo Afghan case (supra) held that a public body is not exempt from the liability to carry out its obligation arising out of the representation made by it, relying upon which the citizen has altered his position to his prejudice. The Court had made a distinction between the representation of an existing fact and a representation that something will be done in future. Representation of existing facts may raise an estoppel, if another person alters his position, relying upon tint representation. A representation that something will be done in the future may result in a contract, if another person to whom it is addressed Acts upon it. A representation that something will be done in future is not a representation that it is true when made. Now, it is undoubtedly true that the power to levy octroi of the municipality is referable to a subordinate legislation and municipality exercises a subordinate legislative power in levying octroi and yet in the facts and circumstances of the case, the representation made by the municipality which in fact was contained in the agreement with the Government and not with the company, was held to be binding. It was, however, contended that subsequently law has further crystalised on the subject and it now appears generally well settled that the state is not subject to estoppel to the same extent as an individual or a private corporation. Reliance was placed on *N. Ramanatha v. State of Kerala*[110], The petitioner in that case was holding a temporary post. These was an agreement between the petitioner and Government of kerala, providing for a term of five years from 3rd October 1968 or till the appellant attained the age of 60 years whichever is earlier. Agreement further stated that the appellant is not to be removed or suspended from the office except in the manner provided for removal or suspension of the chairman or the members of the State Public Service Commission. Subsequently the Government Stated that the post of the Vigilence Commissioner, which the petitioner held, was a temporary one, and the present sanction for the post will expire on 28th February 1970 and the Government further stated that there was no need to have a Vigilence Commissioner and the post would be abolished with effect from 28th February 1970 the petitioner questioned the correctness of this order. One of the contentions was that the petitioner entered into an agreement with the Government and by accepting the officer changed his position and state was precluded from altering the terms of agreement on the principle of estoppel.This contention was negatived on the ground that the post itself was temporary and was sanctioned for a certain period and that if in public interest continuance of the post was not considered necessary by the State Government, estoppel cannot be successfully pleaded against state which, it was conceded would be in conflict with the public interest while negativing this contention, following passage from American Jurisprudence 2nd at page 793 paragraph 123 was quoted with approval:

"Generally, a state is not subject to an estoppel to the same extent as in an individual or a private corporation. Otherwise, it might be rendered helpless to

[110] A.I.R. 1973 S.C. 2641

assert its powers in Government. Therefore, as a general rule the doctrine of estoppel will

not be applied against the state in its Government, public or sovereign capacity. An exception however arises in the application of estoppel to the state where it is necessary to prevent fraud or manifest injustice."

The observation of the High Court that the Courts exclude the operation of the doctrine of estoppel, when it is found that the authority against whom estoppel is pleaded has owned a duty to the public against whom the estoppel cannot fairly operate, was approved. The principle deducible from the observations herein quoted is that if a promissory estoppel results in precluding the state from exercising powers which it must exercise in public interest, estoppel would not operate against state, because to do so would be to compel the state to Act contrary to public interest. In a very recent decision in *Excise Commissioner v. Ram Kumar*[111], this position was reaffirmed and after quoting a part of the quotation from the American jurisprudence second at p. 783, and G.R. Silk Mfg. Case (supra), plea for estoppel against State Government was negatived. It must be frankly stated that in the last case, on the filets pleaded, no question of estoppel arose. The plea was likely to be negatived on the facts pleaded. Auction was held authorising the licensee to sell the country liquor under a licence. At the relevant time, to a query whether country liquor was made exempt from Sales Tax, the reply was that there was no Sales Tax. This was a statement of existing position. Subsequently notification granting exemption was withdrawn and Sales Tax was levied on the sale of country liquor. Licensee had obtained licence and he challenged this Action of the Government claiming relief that the state was estopped from making demand in respect of the Sales Tax and recover the same from him. The contention was negatived. There was no representation that Sales Tax would not be levied. The query was whether there was at the relevant time Sales Tax on the sale of country liquor, and the answer was that there was no such Sales Tax. In fact, there was a notification exempting the sale of country liquor from Sales Tax but no one assured that exemption could not be withdrawn. The relevant law clearly authorised the Government to grant exemption or to withdraw the exemption and there was no promise that exemption would not be withdrawn. Therefore, plea of estoppel fails on the facts pleaded. However, various decisions bearing on the question were examined, though Anglo Afghan (supra) and Turner Morrisson (supra) were not referred to. A controversy was raised whether the observations of the Supreme Court in these last cases were obiter, while the decision in Anglo Afghan case (supra) was clearly binding. In fact Mr. Seervai went to the extent of saying that the decision in Ramatha's case and excise Commissioner's case were per incuriam. We need not examine this aspect at all. Even the last two cases did not lay down that in no case, estoppel can be pleaded against Government. Quotation from the American Jurisprudence clearly shows that exception has to be made, to the general rule in the application of estoppel to the state where it is necessary to prevent fraud or manifest injustice. Thus though that portion is not quoted in the Excise Commissioner's case (supra), yet, in para 23, observation of the High Court of Jammu and Kashmir in *Malhotra & Sons v. Union of India*[112] has been quoted with approval and which says that:

[111](1976) 2 S.C.C. 540
[112] A.I.R. 1976 J. & K. 41

> "The Courts will only bind the Government by its promises to prevent manifest injustice or fraud and will not make the Government a slave of its policy for all times to come when the Government Acts in its Governmental, public or sovereign capacity."

127. On a conspectus of these decisions, a proposition emerges and in fact Mr. Seervai fairly conceded that it can be said with confidence that there can be no estoppel against legislature, meaning thereby an express binding agreement cannot fetter legislative power. Secondly there can be no estoppel against the mandatory provisions of law and estoppel cannot be pleaded against the person who has Acted without authority to Act in that behalf even though he has made a representation that he had the necessary authority, for to hold otherwise would be converting ultra vires Act into a legal exercise of power. An assurance given about future exercise of power will not constitute equitable estoppel, if such assurance affects an exercise of power where public interest demands such exercise.

128. There is indisputable power to transfer a High Court Judge and that power has to be exercised in public interest. If the President is bound by estoppel as is sought to be contended, the President would be precluded from exercising the same power even in public interest. Therefore, in a situation of this nature, it is difficult to uphold the plea of estoppel.

129. Having cleared the grounds about the position in law, I would like to rest my judgment on the question of fact, namely, that speech of Mr. A.K. Sen, did not contain assurance for future conduct that no judge would be transferred without his consent. Let us look at the context in which the speech came to be made. This speech was made while moving Constitution 15th Amendment Bill, 1963. By the aforesaid measure, Sub-article (2) of Article 222 was introduced, providing for payment of compensation. By this very amendment, retirement age of the High Court judge was raised from 60 to 62. So also Sub-article (2A) of Act 124 providing the procedure for determining the age of Judge of the Supreme Court and Sub-article (3) of Article 217, conferring power on the President after consulting the Chief Justice to determine the question of age of High Court Judge were introduced. Excepting Section 8, 9, 10, and 11 of the amendment bill, rest of the sections were touching the Judges of the High Court and Supreme Court. The attention was focussed on the status position and even on the conditions of service of Judges of the High Court. It appears that criticism was made that by the said amendment, the executive was attempting to interfere with the independence of judiciary and while piloting the bill Mr. A.K. Sen the then law Minister tried on behalf of the Government to allay the apprehension and silence the critics by saying that the executive is not clothing itself with power to interfere with the independence of judiciary. He starts by saying that then there was the question of transfer of Judges. He referred to the criticism that the provision which he was seeking to introduce in Article 222(1) was designed to coerce the Judges and to keep them in a state of perpetual fright. Then he says that this argument completely ignores fact and history. He then said that the Constitution itself contains a provision even now for transfer of Judges from

one High Court to another without any compensatory allowance. He then said that there was convention not to transfer a Judge without his consent and such convention has worked well for the 12 years prior to 1963, and all the transfers till then have been made not only with the consent of the transferee Judge, but also in consultation with the Chief Justice. Second part of the speech clearly reiterates that the power of the president to transfer a Judge from one High Court to another was unfettered but by convention the Government has not transferred Judge without his consent which explains a good deal of restrain with which the powers have been exercised and completely negatives the unfounded charge that the Government tries more or less to interfere with judiciary. In fact i see nothing in this statement as being a statement of policy containing a representation to do or not to do anything and relying on which if someone alters his position, a claim for promissory estoppel can be founded thereon. Reference is made to what has been done till then. Speech was to repell the charges of interference. There was no promissory representation that in future transfer would not be made without consent of the Judge concerned. The answer is that 'we have not interfered with the independence of judiciary'. Word 'convention' was relied upon to say that convention is invariably followed and if departed from, there is change in policy, which can be enforced only in future. I do not think that such a meaning can be given to the word 'convention' as used in the speech. Speech will have to be read as a whole. It cannot be read in part torn out of its context. When read as a whole, the speech only means that the charge of interference with the independence of judiciary is unfounded and while repelling the charge, what Government has been doing is reiterated. But precaution is taken to assert the power to transfer and apart from the claim that it was an unfettered power it is very much there in the Constitution. There is no grain of assurance of any future conduct assured in this speech. The speech does not contain a representation on behalf of the state thrown out to the world at large that anyone who wants to be a Judge of the High Court is assured that he would never be transferred without his consent. It is not possible to read in this speech promise of future conduct. Mr. Sen would not make any such promise because he claims that the power to transfer is very much there in the constitution hedged in with only condition that it can be exercised in consultation with the Chief Justice and by his mere speech, he would not introduce further limitation on the power of the president that it can be exercised with the consent of the Judge. There is no promise of future Action. There is no indication of policy for future Action or the line along which the Government would proceed. It is merely a sort of rhetoric of Minister defending the Government and repelling the charges made against the Government. If the speech did not contain any promise for future conduct or Action, even if the petitioner so read it, relied upon it and Acted upon it, yet, it is not open to him to plead estoppel against state, when he is transferred without his consent. Conceding the principle that assurance or promise of the state contained in its policy statement, which was intended to be Acted upon and was in fact Acted upon, the Government is not exempt from the liability to carry out obligation, there is no representation contained in the speech, relying upon which, a citizen namely, the petitioner, has altered his position to his prejudice. The statement is merely a statement on the floor of the house, repelling charges of interference with judiciary and even reading between the lines there is no germ of any promise of future conduct or any policy decision being continuously persued and

would continue to be pursued in future and thus no case of Promissory Estoppel can be entertained and the contention must accordingly be negatived.

130. Last contention is whether the power of the President under Article 222 is unfettered? What are the conditions for the exercise of such a discretionary power? Have these conditions been fulfilled? What is the scope and nature of consultation as envisaged by Article 222(1)? All the limbs will have to be examined separately.

131. Bare reading of the article would show that the power of the President to transfer a Judge is not unfettered as is claimed. There is limitation on power, namely, prior consultation with the Chief Justice is mandatory, the article confers power on the President, but it is not coupled with the obligation in the sense that the President may transfer a Judge, but it is not obligatory for him to transfer a Judge. It is, therefore, a discretionary power. How should discretionary power be exercised? Should we go in search of guidelines or norms for the exercise of such power? When the power is conferred by a basic law of the land, namely, the constitution, it must have been conferred for some purpose, and it can only be exercised for that purpose. Purpose which we can gather from all the relevant articles is that transfer of a Judge must be in public interest. It must not be a transfer in ordinary routine course, but it must be to achieve some public purpose. Respondents say that the purpose sought to be achieved is national integration and strengthening of judiciary. At one stage, it was submitted on behalf of the petitioner that a review of the relevant provisions, especially the judiciary provisions of the constitution did not indicate that to serve public interest for which the power of transfer can be exercised includes national integration. We cannot narrow down the concept of public interest in this fashion. National integration is a wider object to be achieved. How far the transfer of a High Court Judge would achieve it may be often to debate, as stated earlier. None-the-less, it is a purpose for which power can be exercised. Strengthening of the judiciary is an expression not capable of any precise meaning, nor was any attempt made to give us form and shape of this concept, so that we could have examined the question that the transfer is for achieving public purpose, namely strengthening of judiciary. An example was given that in a High Court, one Judge may have acquainted himself thoroughly in one branch of law and in another High Court that department is weak, and the transfer may be to strengthen the judiciary of the other High Court. Such a situation conceivably may arise and cannot be rejected as merely a myth or ruse. But it was countered by saying that a Judge of the High Court who had hardly nine months to go and minus vacation and holidays would have hardly five to six months of Active service, yet he was transferred, and it is inconceivable that it would either consolidate national integration or strengthen judiciary. That individual's case is not being examined by us here, though it did call for some explanation on behalf of the respondents and I would have occasion to revert to it.

132. Whenever a party is invested with discretionary powers it is implicit therein that power must be exercised reasonably, meaning thereby, in a reasonable manner; and it must be exercised for the purpose for which it is conferred. And in Article 222 consultation with Chief Justice of India

being made obligatory, it would indicate that the head of the judiciary would be better conversant as to how public purpose would be achieved by transfer of a High Court Judge. It cannot, however, be gainsaid that the power has to be exercised reasonably. A person in whom is vested a discretion must exercise his discretion upon reasonable ground. A discretion does not empower a man to do what he likes merely because he is minded to do so. He must in the exercise of his discretion do not what he likes, but what he ought. In other words, he must, by use of his reason, ascertain and follow the form which reason directs. He must Act reasonably vide *Roberts v. Hoopwood*[113] at p. 613. In a very celebrated passage in Maxwell on the Interpretation of Statutes, Twelfth Edition at p. 148 there is following observation:

[113](1925) A.C. 578

> "When' said Lord Maisbury I.C. it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and Justice, not according to private opinion. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself."
>
> It, therefore, cannot be gainsaid that whenever discretionary power is conferred, it must be exercised reasonably and it must be exercised for the purpose for which it is conferred. If it is not exercised for the purpose for which it is conferred, exercise would be open to charge of abuse of power for a collateral purpose.

133. It is, therefore, necessary to examine whether this power has been reasonably exercised. Power is a power of transfer of a High Court Judge. Transfer, it is well-recognized, sometime causes more harm than even punishment. The question, therefore, is whether power to transfer has been exercised reasonably meaning thereby for the purpose for which it is conferred.

134. What relevant factors should be taken into consideration before ordering transfer especially of a High Court Judge? Transfer, as has been already observed by me, is likely to cause hardship and inflict injury both private and to some extent public. When a Judge is to be transferred, questions such as, whether it is necessary to transfer him in public interest, and if the answer is in the affirmative, to which station he be transferred, because as stated in State of *Assam v. Ranga Mohammed* (supra) by Hidayatullah J. (as he then was), some are good stations and some are not so good, would arise. I would add some are heavy stations and some are light stations and capacity of Judge to deal with file of a heavy station may have also to be kept in view. It is for this reason that in Ranga Mohammed, case (supra), the High Court was considered better suited to direct transfer of District Judge than a Minister Acting on notes. Same considerations would mutatis mutandis apply here and to make them effective, it would be necessary to consider the scope of Consultation in Article 222, because, power to transfer is hedged in with the limitation that it can only be exercised with prior consultation with the Chief Justice. Chief Justice as highest judicial officer at the top of the judicial branch of the Union of India, would be well-equipped to examine the question of transfer in its proper perspective; in other words, he would be able to look to the relevant considerations when he is consulted for transfer.

135. Consultation is not an empty formality and it was not disputed in behalf of the respondents that it was a matter of substance and not of form. Consultation may remain merely formal, if the party to be consulted is informed of the proposal and party exercising power would wait for reasonable period for reply and formal consultation would come to end. In such a situation, it cannot be said that there was no consultation. That is not the consultation contemplated by Article 222. If that is the scope of consultation, protection afforded by consultation becomes teasing illusion and false promise. As was stated in another context concerning judiciary consultation loses all its meaning and becomes mockery if what the High Court has to say was rejected out of hand and in such matters the opinion of the High Court is entitled to highest regard Vide *State of Assam v. Ranga Mohammed* (supra). In Article 233 the constitutional mandate appears to be clear. The exercise of the power of appointment by the governor is conditional upon 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. This mandate can be disobeyed by the governor in two ways, (i) directly by not consulting the High Court at all, and (ii) indirectly by consulting the High Court and also other persons. That this constitutional mandate has both a negative and positive significance is made clear by the other provisions of the Constitution. Various provisions of the constitution 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. vide *Chandra Mohan v. State of U.P*[114]. at 1992 "consultation or deliberation would not be 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 proposed the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation" vide *Chandramauleshwar v. Patna High Court*[115], These pertinent observations are relevant in the context of consultation when executive has to deal with a judicial officer.

136. Periphery of discretionary power to transfer a High Court Judge thus gets clearly defined and demarcated by limitation and fetter on the power of transfer, namely, consultation with the Chief Justice of India and this consultation to be effective and meaningful must be consultation keeping in view the record of the concerned Judge and taking into consideration all the relevant factors, because any departure or deviation from this strict construction would permit the executive to punish a Judge, because transfer, as has been more often said, is sometime more harmful than punishment.

137. Whenever, the Chief Justice, is consulted concerning the question of transfer of High Court Judge, he will have to keep in view whether the executive is motivated by any ulterior motive in seeking transfer of that particular Judge? Whether such a transfer is likely to achieve any public purpose? Whether the public purp 32 would be well served, or ill served, if that Judge suffers such personal hardship and inconvenience as to make him disgruntled or frustrated Judge likely to avoid his work?" Personal hardship that can be inflicted by such transfer on a particular Judge must certainly be present to the mind of the Chief Justice when he is being consulted about the transfer of that Judge, and the Chief Justice will have to keep overall picture in view that here is a transfer proposed by a litigant, of a Judge, who in discharge of his duty, might have displeased the litigant and that motivated by such collateral purpose, transfer is proposed, though the proposal is couched in such high sounding words as 'national integration' or 'strengthening of judiciary'. The Chief Justice is the sole custodian of the interest and freedom of the judiciary, and it is he who must protect and guard the same, and that he can do so, only if he keeps all these relevant factors into consideration and after keeping all these factors into consideration whatever advice he gives must be treated by the president so weighty

[114] A.I.R. 1966 S.C. 1987

[115] AIR 1970 S.C. 370

as to be binding. The provision in the article is that there should be consultation with the Chief Justice of India, who is ex hypothesi well qualified to give proper advice in matters of this sort. Krishna Iyer J., resolved the dilemma arising out of the law laid down that president as constitutional head must Act on the advice of the Minister, who may by power of transfer exercise some control over judiciary which would have the tendency to undermine the independence by reading into consultation such protection as would make the advice preferred on consultation binding. That is what he says in Samasher Singh's case (supra):

> "The independence of judiciary, which is a cardinal principle of the constitution and has been relied on to justify the deviation, is guarded by the relevant article making consultation with the Chief Justice of India obligatory. In all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India and the court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong in the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order."

138. The question then is whether there is material in this case to hold that Consultation with the Chief Justice of India was of the nature herein discussed. The impugned order recites that the transfer has been ordered in consultation with the Chief Justice of India. Chief justice of India is a party to this proceeding and in my opinion, he is a proper party. He has not chosen to file an affidavit-in-reply though there were care in averments in respect of which he would have been best suited to file affidavit-in-reply. Union of India has filed the affidavit, and frankly speaking, it leaves much to be desired. The averments on the topic of consultation in the petition are to be

found in para 9 of the petition, wherein the petitioner sets out his personal difficulties about education of his children, about old parents compelled to stay away from Ahmedabad where medical aid is not available, about his daughter who is having a dental consultation room had to close down the same. He then talks of public injury in para 10. In para 14, he complains that the order suffers from non-application of mind. He sets out cases from which, it can easily be inferred that transfer was penal in character in that amongst the Judges Transferred there are some who had pronounced judgments against the Government. In para 16, he avers that consultation with the Chief Justice of India in the matter of transferring a High Court Judge from one High Court to another state High Court is not formal and empty requirement and it is a matter of substance. He avers that it is the duty of the Chief Justice of India to point out all consequences which such a transfer would produce the consequences which produce public as well as personal injury to the transferee. The petitioner then makes a pertinent statement that the petitioner is not aware and does not admit that the honourable the Chief Justice of India brought to the notice of the president of India the different types of public and personal injury which will be caused by the transfers. It is further averred that petitioner is not aware and does not admit that the honourable the Chief Justice of India brought to the attention of the president of India the statements made on behalf of the Government of India in 1963 which are set out in para 6 of the petition. He further averred that if all these facts were brought to the notice of the president and yet they were disregarded, it would amount to exercise of power for the purpose for which it was not conferred and the impugned order would be void on that ground. It is also averred that in mass transfers unless all details are taken into consideration, the very concept of consultation is likely to break down under its own weight. On these averments, it was said that the Chief Justice is the proper party and he has been so joined. In the affidavit-in-reply filed by the deputy secretary to Government of India, ministry of law, justice and company affairs (Department of Justice) on behalf of respondent No. 1, it is said that the Chief Justice of India is not a proper party. It is also asserted that the power was exercised as required by the constitution, namely, after consultation with the Chief Justice. It was denied that the Judges who gave judgment against the Government were selected for transfer and it was said that some Judges who gave judgment against the Government were also promoted and information about it would be disclosed at the hearing of the petition. No such information was given. In the affidavit-in-rejoinder, it is said that the assertion that the Chief Justice of India is consulted on relevant factors is not admitted. In fact, in the affidavit-in-rejoinder, it is clearly averred as to what are the relevant considerations which must be taken into account by the Chief Justice when he is consulted about the transfer of a High Court Judge and it is said that no information was called far from the petitioner on the relevant consideration and the Chief Justice of India would have no other source of getting the same and in this background there was no consultation as is required by the constitutional mandate. Now, in this state of pleadings, it was for the Government of India to put the relevant facts on record to show what was the nature of consultation with the Chief Justice of India. The consultation, at its worst, may be mere intimation of proposal, the reply being ignored or not even awaited. At its best, in the Words of Krishna Iyer J. It would tantamount to concurrence. Between these termini we have to find out what was the consultation,

keeping in view the admitted position that it is a matter of substance and not of form. And let it be recalled that the Chief Justice should have been aware that after 25 years, there is a mass transfer of High Court Judges and that too without consent of concerned Judges, and looking to the averments made which are merely denied, and what was the nature of consultation, having not been disclosed, an indelible impression is likely to be formed that at least in case of some Judges transfer may be in the nature of penalty imposed. In such circumstances, it was incumbent upon the Government of India to put all the material on record. The learned additional solicitor general said that bare denial of the petitioner would not help and it is for him to put material on record. Such an approach overlooks the obvious principle that a party who is in possession of evidence and has a duty to disclose, must disclose the same and cannot expect the impossible to be performed by the other side. How would the petitioner know what transpired between the president and the Chief Justice of India? It is impossible to expect of him to say anything about it. As there is a recital in the impugned order that Chief Justice of India was consulted, one can say that there is prima facie evidence of consultation. But this would not raise presumption of consultation on relevant factors and consultation to be meaningful must ex facie show that all relevant considerations were kept in focus and it was not an empty dialogue. The petitioner would, in no circumstances, be able to throw any light. But the petitioner does not admit that the consultation was with reference to relevant factors and affirmed what are the relevant factors and if those appear to us to be relevant, it was open to the Government of India to disclose the nature and content of the consultation to satisfy the Court that constitutional mandate has been fully carried out. Government of India has not disclosed.

139. Now, at one stroke 16 Judges are transferred and one of them having nine months service before he would retire. Out of nine months there would be holidays and short vacation. He was transferred. Could he be said to have been transferred for achieving national integration? It is difficult to believe. Could he even be said to have been transferred for strengthening judiciary? I fail to understand how within six months he would have strengthened Andhra Pradesh High Court judiciary by making his presence felt. Aid look at his personal inconvenience. He must set up his house at Hyderabad. He belongs to Bombay. I do not know whether he belongs to Bombay bar, or he was brought from subordinate judiciary, but he appears to be a resident of Bombay, pushed out for a period of nine months to hyderabad. This would indicate that in case of mass transfers from various High Courts involving Judges, some having fairly long service, some having short span of service, were lumped together and yet it is vaguely said that in the case of each, there was a proper substantial and adequate consultation. The consultation as contemplated to be valid, legal and meaningful, must be qua each judge to be transferred, keeping in focus personal and public injury of each consequent upon his transfer. In the absence of any material, it is difficult to reach an affirmative conclusion that there was consultation as required by constitutional mandate. The Chief Justice of India appeared through counsel but he left the matter at that. He as Chief Justice of India was consulted. That is an averment both in the impugned order, is well as in the affidavit-in-reply. The petitioner sets out various facts, which may prima facie show that consultation was not related to each individual Judge's personal

hardship and public injuries. And Chief Justice as pater families, if he could have disclosed what was the nature of consultation, judiciary having highest regard for the holder of its top most post, would have been overwhelmed by the fact that its interest has been properly looked after and that transfers were in public interest beyond the slightest pale of controversy and no inference of use of power for collateral purpose was even possible. The Chief Justice of India has not thought fit to do so and the record, as it is, clearly indicates that all relevant aspects appear not to have been taken care of, otherwise it is not possible that a man who was about to retire within about nine months' time should have been pushed out from Bombay to Hyderabad, which could neither bring about national integration nor strengthen judiciary in such a short time. We can multiply this illustration. In mass transfers undertaken for the first time after 25 years, it should be very necessary for the Chief Justice to keep in view the policy hitherto adopted, and why it was being departed from. That would have been very important and relevant consideration. There is no material which would show that was present to the mind of the Chief Justice. How can it then be said that consultation was meaningful in the sense of substance, whether there was application of mind to each relevant detail qua each Judge and decision reached.

140. It is not for a moment suggested that the proposal for transfer must emanate from the Chief Justice. That is not expected and it is bound to emanate from the president. The process for inception of the proposal is not to be reversed. Such a thing may also be open to objection and the reason is apparent. It would be amply clear, if I quote what Mr. Ambedkar said in constituent assembly in a slightly different context which is apposite:

> "With regard to the question of concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment, I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the falling, all the sentiments and all the prejudices, which we as common people have; and I think to allow the Chief Justice a veto over the appointment of Judges is really to transfer the authority to Chief Justice which we are not prepared to vest in the president or Government of the day."
>
> Our constitution provides checks and balances with a view to eliminating arbitrary exercise of power, conferred on any authority. Therefore, it is not wise to reverse the process for transfer by suggesting that the proposal itself must originate with the Chief Justice. It must emanate from the president. But that proposal has to be examined more particularly in the light of the fact that such a transfer as proposed by the executive, namely, the litigant, of a High Court Judge, who has to deal with the case of the executive, day in day out, in discharge of his duties, and that except the public interest, there is no other underlying motive or purpose behind the transfer and this must be part of consultation by applying mind to its various ramifications. If such is the process of meaningful, consultation, it would be really very difficult to come to a conclusion even in individual case for the Chief Justice of India. It would be almost impossible in the case of

mass transfers. And doubts have been cast that there was no consultation as required by the relevant provisions and no attempt is made to remove doubt, allay apprehension and restore confidence. There is a glaring case which would not have gone unnoticed if consultation was meaningful. The Chief Justice could have pointed out unerringly that the Judge sought to be transferred has hardly nine months to retire. One must recall here that there was no precedent and there is a departure from a policy consistently followed after a quarter of a century. Therefore, reluctant as I am, I have to say that the head of the judiciary does not appear to have taken into consideration all the relevant data when he was consulted and therefore, it is an inescapable conclusion to which I must inevitably reach that the transfer order for want of consultation as required by the constitution is void.

141. If the consultation was not substantial, and meaningful, the precondition for the exercise of the power is not satisfied and order of transfer is, therefore, vitiated and if the order is void, it has to be so declared and quashed.

142. Incidentally, we were told that no mandamus can be issued against the president to cancel the order. I need not examine that aspect though Article 361 is a complete answer to that question.

Per Court

143. The petition accordingly, succeeds on this ground and therefore, I concur in the final order passed by J.B. Mehta J.

144. In the result this petition must be allowed. The impugned transfer order dated May 27, 1976 at annexure "a" is, therefore, declared illegal, invalid and ultra vires, and a mandamus is issued against the first respondent, Union of India, to treat said order as of no legal affect and consequence against the petitioner, and to desist from giving effect or continuing to give effect to it. Rule is accordingly made absolute with no order as to costs.

145. On behalf of respondent No. 1, Mr. Mehta made a request for a certificate for appeal to the Supreme Court. The certificate must be issued under Articles 132 and 133 (1) of the constitution as the constitutional question of the true interpretation of Article 222(1) is also a substantial question of law of wide general importance which, incur opinion, requires to be certified as fit for appeal to the Supreme Court, the certificate shall accordingly issue.

146. At Mr. Mehta's request the operation of the order of the Court is stayed for a period of six weeks from to-day.

Rule made absolute : Leave : Leave to appeal granted.