

PETITIONER:
KUMAR PADMA PRASAD

Vs.

RESPONDENT:
UNION OF INDIA AND ORS.

DATE OF JUDGMENT 10/03/1992

BENCH:
KULDIP SINGH (J)
BENCH:
KULDIP SINGH (J)
SAWANT, P.B.
KASLIWAL, N.M. (J)

CITATION:
1992 AIR 1213 1992 SCR (2) 109
1992 SCC (2) 428 JT 1992 (2) 247
1992 SCALE (1) 581

ACT:

Constitution of India, 1950 :
Articles 50, 136, 139A, 217(2), 233, 236(b), 237-High Court Judge-Appointment-Necessary qualifications-Whether Supreme Court/High Court can exercise jurisdiction on the ground that the incumbent does not fulfill qualifications as required by Article 217.

'Judicial Office'-Concept of-Explained.

Government of Mizoram Notification CS/MZ/APPT/79 dated 23.6.1979-Assistant to Deputy Commissioner appointed under Rules 8,9 and 15 of 1937-Rules for regulation of procedure of officers to administer justice in Lushi Hills. 1937-Rs. 8,915-Assistant to Dy. Commissioner-Exercising powers analogous to those of a judicial Magistrate First Class under Code of Criminal Procedure, 1973-Whether holds a judicial office.

Independence of judiciary-Necessity for.

Administration of justice- Whether High Court can assume jurisdiction on judicial side to probe into matter purely of administrative nature and exclusively within purview of Chief Justice.

Words and Phrases

"Judicial Office", "Judicial service"-Interpretation of.

HEADNOTE:

The Governor of Mizoram, by a letter dated 5.5 1990, addressed to the Chief Justice of Gauhati High Court, recommended the name of respondent no. 9 for appointment as a Judge of the High Court. The bio-data enclosed with the said letter indicated that respondent no. 9, after passing L.L.B., joined the Government of Assam in Law Department in 1966 as a Gazetted Officer. He worked on various posts, under the Government of Mizoram and Assam, such as, Law Officer in Finance Department, Under Secretary, Law and Judicial, Registrar Firms, Deputy

110

Secretary law & Judicial and Deputy Legal Remembrancer. In 1985 he was appointed as Legal Remembrancer and Secretary Law and Judicial. He worked as D.C. (Judicial) in 1987. He also worked as Member/Presiding Officer/Chairman of certain

Tribunals/Committees. The bio data described him as belonging to Mizoram Judicial Service. The Chief Justice forwarded the papers to the Minister of Law and Justice Government of India. The Union law Minister, the Chief Justice of India, the Prime Minister of India and the President of India on their respective turns cleared/approved the name of respondent no. 9 for the appointment. The warrant of appointment was signed by the President of India on 15.10.1991 and the Notification appointing respondent no. 9 as a Judge of Gauhati High Court was issued on 25.10.1991.

The petitioner filed a writ petition before the Gauhati High Court on October 23, 1991 challenging the selection of respondent no. 9 for appointment as a Judge of the Gauhati High Court on the ground that he was not qualified for such an appointment. The High Court passed an interim order holding that it was doubtful if respondent no. 9 possessed qualifications as provided under Article 217(2), and directed that the warrant of appointment of respondent No. 9 issued by the President of India should not be given effect to. Respondent No.9 was also restrained from subscribing his oath or affirmation in terms of Article 219 of the Constitution.

Before the writ petition was filed by the petitioner, the Mizoram Bench of Gauhati High Court suo-motu assumed jurisdiction under Article 226 of the Constitution and by its order dated 20.11.1990 directed to register a case against respondent no. 9 in respect of anomalies in purchase of law books for the High Court. The Chief Minister, Mizoram by letter dated 7.10.1991 conveyed to; the Union law Minister that a vigilance case was instituted against respondent no.9. The letter dated 8.10.1991 addressed by Chief Justice, Gauhati High court to the Union Law Minister did not indicate about any such case. The Law Minister ignored the letter of the Chief Minister. Later on the State Government by a wireless message dated 2.11.1991 informed the Department of Justice, Government of India that respondent no.9 had been placed under suspension in view of the case pending against him in the High Court.

Respondent No.9 filed a special leave petition and a writ petition

111

before this Court. Two transfer petitions, one by respondent no.9 and the other by the petitioner, were also filed seeking transfer to this Court of the writ petition filed by the petitioner in Gauhati High Court. Consequently the said writ Petition was transferred to and was heard by this Court.

It was contended by the petitioner that the appointment of respondent no.9 as a High Court Judge was violative of Article 217(2) of the Constitution as he did not fulfill the qualifications prescribed therein inasmuch as he neither had been an Advocate of a High Court nor had he ever held a judicial officer; and that by virtue of respondent's appointment as Assistant to the Deputy Commissioner during the year 1979 in addition to his own duties as Under Secretary, Law and Judicial, he did not hold a Judicial Office as envisaged under Article 217(2)(a) of the Constitution.

Allowing the transferred writ petition of the petitioner, this Court,

HELD: 1. The High Court Judges are appointed from two sources, member of the Bar and from amongst the persons who have held "judicial office" for not less than ten years. Even a subordinate judicial officer manning a court inferior

to the District Judge can be appointed as a Judge of a High Court. [p.131E]

2.1 Expression "Judicial office" has not been defined under the Constitution, nevertheless, it has to be interpreted in consonance with the scheme of Chapters V and VI of part VI of the Constitution and has to be given the meaning in the context of the concept of judiciary as enshrined therein. It would be logical and consistent with the Consistent with the Constitutional scheme to read "judicial office" under Article 217 (2)(a) to mean an office within the judicial service of the State. [pp.127D;132E, 133F]

Statesman (Private) Ltd. v. H.R. Dev & Ors., [1968] 3 SCR 614, referred to.

2.2 Holder of "judicial office" under Article 217(2)(a) means the person who exercise only judicial functions, determines causes interprets and renders decisions in a judicial capacity. He must belong to the judicial service which as a class is free from executive-control and is disciplined to uphold the dignity, integrity and independence of judiciary. The expression "judicial office" in the said Article means an office which is a part of judicial service as defined under Article 236(b) of the Constitution. [pp.131G-H; 132A, F-G]

112

2.3 Article 236 (b) defines "judicial service" to mean District Judges and Judges subordinate thereto. Appointment of District Judges under Articles 233(2) can only be from the judicial service of the State as defined under Article 236(b). [pp.127 EF; 131D]

Chandra Mohan v. State of Uttar Pradesh & Ors., [1967] 1 SCR 77, followed.

2.4 Ordinarily the District Judges who are superior members of the judicial service are considered for appointment as Judges of the High Court but the constitution-makers wanted to hold-out a possibility of elevation as a Judge of High Court to the Subordinate Judges, so as to infuse amongst them a sense of responsibility and an incentive for maintaining efficiency and it was with that objective that the expression "judicial office" has been used in Article 217(2)(a) of the Constitution. [p.132E-F]

2.5 In order to qualify for appointment as a Judge of a High Court under Article 217(2)(a) a person must hold a "Judicial Office" which must be a part of the judicial service of the State. [p.133F-G]

2.6 The expression "judicial office" in generic sense may include wide variety of offices which are connected with the administration of justice in one way or the other. Although under the criminal Procedure Code, 1973 powers of Judicial Magistrate can be conferred on any person who holds or has held nay office under the Government and officers holding various posts under the executive are often vested with the Magisterial-powers to meet a particular situation, yet the constitution framers did not provide a source of appointment to the high office of a High Court Judge from amongst the holders of a "judicial office". [p.131F-G]

2.7 A person-who is holding a judicial office in the generic sense and is not a member of the judicial service of the State-is not eligible to be appointed as District Judge. When a person is not eligible to be appointed as a District Judge it would be mockery of the Constitution to hold that he is eligible to be appointed as a Judge of a High Court. The Constitutional-scheme is clear. [p.132B-D]

3.1 The independence of judiciary is part of the basic structure of the Constitution. To achieve this objective there has to be separation of

113

judiciary from the executive. The framers of the Constitution did not and could not have meant by a "judicial office" which did not exist independently and the duties or part of the duties of which could be conferred on any person whether trained or not in the administration of justice. The Directive Principles as enshrined in Article 50 of the Constitution, give a mandate that the State shall take steps to separate the judiciary from the executive which means that there shall be a separate judicial service free from the executive control. Chapters V and VI in part VI of the Constitution provide for the High Courts and subordinate courts in the State. The scheme under the Constitution for establishing an independent judiciary is very clear. The Constitution-scheme, therefore, only permits members of the judicial service as constituted in terms of Article 236(b) of the Constitution to be considered for the post of District judge and that of the High Court Judge. [pp.132D;143D; 144C-D]

3.2 The word "judicial office" in Article 217(2) means a subsisting office with a substantive position which has an existence independent from its holder. [p.143E]

Smt. Kanta Kathuria v. Manak Chand Surana, [1969] 3 SCC 268 and Great Western Railway Company v. Bate, 8 Tax Cases 231, referred to.

3.3 The judicial service in a State is distinct and separate from the other service under the executive. The members of the judicial service perform exclusively judicial functions and are responsible for the administration of justice in the State. Magistrates who are not appointed to the judicial service of the State can be brought into the judicial service by way of a notification under Article 237 of the Constitution of India. Till the time there is separation of judiciary or a notification under Article 237 of the Constitution of India is issued there is no question of considering the executive officers or even Magistrates for appointment to the post of District Judge or a High Court Judge even though the executive officers or Magistrates concerned have the adornment of a judicial office. [pp.128A;145C-E]

3.4 The office of the Assistant to Deputy Commissioner, held by respondent No. 9 for about six months, by virtue of Notification dated 23.6.1979 issued by the Government of Mizoram under 1937 Rules for the Regulation of the procedure of officers appointed to administer justice in the Lushai Hills, was neither a judicial office nor was it part of a judicial service as defined under Article 236(b) of the Constitution. [pp.138C-H;143F-G]

114

3.5 Keeping in view the exigency of administration different officers working with the Government of Mizoram, including respondent no.9, who was working as Under Secretary, Law and Judicial were by the Notification dated 23.6.1979, appointed Assistant to Deputy Commissioner and were invested with the powers of judicial and executive Magistrates in addition to their own duties. There was no separate office with a designation of Assistant to the Deputy Commissioner. Under the 1937 Rules there was no separation of judiciary from the executive. There was no judicial service as envisaged by Article 236(b) of the Constitution and as such an Assistant to Deputy Commissioner could not be judicial officer in terms of Article 217(2)(a)

of the Constitution. [pp.141E-H; 142A-B]

3.6 The office of Legal Remembrancer-cum-secretary Law and Judicial is non-judicial office under the control of the executive. The Mizoram Judicial Service came into existence with effect from February 17, 1986 and even if full benefit of that service is given to the respondent for the purposes of Article 217(2)(a) he is not qualified as the total period counted from February 17, 1986 comes to less than ten years as required under the said Article. Besides, he never held any of the judicial offices as enumerated in Schedule A to 1989 Rules pertaining to Mizoram Judicial Service, and unless he has held a judicial office in a judicial service he does not come within the purview of Article 217(2)(a). [p.136A-C]

3.7 A cursory look at the bio-data would show that the respondent was not qualified for appointment as a Judge of High Court on the admitted facts which have been on the official files all the time. [p.137A]

4. The independence, efficiency and integrity of the judiciary can only be maintained by selecting the best persons in accordance with the procedure provided under the Constitution. These objectives enshrined under the Constitution of India cannot be achieved unless the functionaries accountable for making appointments act with meticulous care and utmost responsibility. [p.137A-B]

5. Ordinarily the domain in such matters lies wholly with the constitutional authorities mentioned in Article 217 of the Constitution, but in exceptional circumstances like the present, where the incumbent considered for appointment as a Judge of a High Court does not fulfill the qualification as laid down expressly under the provisions of the Constitution itself, it becomes bounden duty of the Court to see that no person

ineligible or unqualified is appointed to a high constitutional and august office of a Judge of a High Court. [p.137E-F]

6. The High Court was not justified in assuming jurisdiction on the judicial side to probe into the anomalies in purchase of books involving respondent no.9. It was a matter purely of administrative nature and was exclusively within the purview of the Chief Justice. [pp.123F-G;124A]

7. Since on the date of issue of the warrant by the President of India, respondent no.9 was not qualified to be appointed as Judge of the High Court, his appointment would be quashed and the Union of India and other respondents would not administer him oath or affirmation under Article 219 of the Constitution of India. [p.145F-G]

S.P. Gupta and others v. Union of India & Ors., [1982] 2 SCR 365, cited.

JUDGMENT:

ORIGINAL JURISDICTION : Transferred Case (Civil) No.101 of 1991.

Under Article 139(A)(1) of the Constitution of India.

V.R.Reddy, Add. Solicitor General, Anil B.Divan, P.K.Goswami, K.K.Venugopal, Ram Jethmalani, M.L.Verma, Kapil Sibal and Shanti Bhushan, A.R.Borthakar, Advocate General, K.N.Madhusudan, Asstt. Advocate General, Syed Naqvi, Ms. Lira Goswami, Ms. Alpana Kripal, M.J.Paul, Kailash Vasudev, P.P.Tripathi, Shaihid Rizvi, K.V.Vishwanathan, Vinod Kumar, S.Banerjee, Ms. A.Subhashini, Ms. Niranjana Singh, Ms.

L.Krishnamurthy, Mrs. H.Wahi, S.K. Nandy, Ms. Urmila Kapoor, P.Goswami, S.Chatterji, D.N.Mukherjee, Anil Katiyar, Ms. Kamini Jaiswal, P.K.Dey, Ms. S.Janani and Ms. Minakshi for the appearing parties.

Shanti Bhusan, Ms. Indira Jaisingh, Soli J.Sorabjee, Jitendra Sharma, Prashant Bhushan, Ms. Kamini Jaiswal, P.H. Parekh and B.N. Aggarwal for the Intervenor.

The Judgment of the Court was delivered by KULDIP SINGH, J. The President of India by a warrant dated October 15, 1991 under his hand and seal appointed K.N. Srivastava as a Judge of Gauhati High Court. He has not as yet made and subscribed an

116

oath/affirmation as required under Article 219 of the Constitution of India and as such has not entered upon his office. The question for our consideration is whether the appointment of Srivastava as High Court Judge is infraction of Article 217(2) and 217(1) of the Constitution of India.

Is he qualified for appointment as a Judge - If so has the mandatory process of consultation under the Constitution been followed.

Shri Lal Thanhawla, Chief Minister Mizoram by his letter dated September 29, 1989 addressed to Chief Justice Gauhati High Court recommended the name of Srivastava for appointment as a Judge of Gauhati High Court Capt. W.A.Sangama, Governor of Mizoram reiterated the recommendation by his letter dated October 4, 1989. The Chief Justice Gauhati High Court by his separate letters dated October 25, 1989 addressed to Governor of Mizoram and chief Minister, Mizoram acknowledged the receipt of the recommendation and stated that he would take necessary action immediately after formation of a Permanent Bench at Aizawl. Mr. Swaraj Kaushal who succeeded Capt. W.A.Sangma as Governor Mizoram addressed a detailed letter dated May 5, 1990 recommending Srivastava for appointment as a Judge. Along with the recommendation he enclosed bio-data of Srivastava which is as under:

"BIO DATA OF SHRI K N SRIVASTAVA, M.J.S
LEGAL REMEMBRANCER AND SECRETARY
LAW & JUDICIAL ETC. GOVERNMENT OF MIZORAM

1. Name : K.N Srivastava
(KESHARI NANDAN SRIVASTAVA)
2. Father's Name : Late Sri Krishna Lal
3. Present address : Law Department
Civil Secretariat
Govt. of Mizoram,
Aizawl 796001
4. Permanent Address : C/o Sri Chandra Mohan Srivastava
254 Bazar Jhau Lal
Lucknow U.P. 226001
5. Date of Birth & Age : 30 January 1938 (52 years)
6. Nationality/Religion : Indian/Hindu
7. Qualification : B.A. LL.B.
(1957-1959 Lucknow University)
8. Service to Which belongs : Mizoram Judicial Service
9. Professional Experience : Took Training for legal practice
in 1960 in Lucknow.
2. Joined Govt. of Assam in Law
Department in 1966 as Gazetted
Officer for Coordination and
translation of all State Laws in
consultation official Legislative
language Commission Govt. Of

117

India.

3. Posted as Law Officer in Finance Department of Govt. Assam to tender legal advice and to look after taxation laws and litigations.

4. Appointed Under Secretary Law & Judicial Govt. of Mizoram, in 1972 to look after all legal matters, advice, litigation, court cases drafting of State Legislation etc.

5. Held charge of Under Secretary, Secretariat Administration Department, General Administration Department, Revenue Excise & Taxation Department, Education, and Social Welfare Department, Govt. of Mizoram from time to time.

6. Appointed as Registrar of Firms & Societies, Government of Mizoram from 23.3.72 to 21.12.1979

8. Appointed Deputy Secretary Law & Judicial and Deputy Legal Remembrancer since

118

1979 and

9. Legal Remembrancer and Secretary Law and Judicial since 1985 and also

10. Appointed Presiding Member of one man Mizoram Motor Accident Claims Tribunal in 1986.

11. D.C. (Judicial) in 1987.

12. Presiding Officer, Industrial Tribunal in October 1989.

13. Declared as Law Officer to appear and conduct cases in all courts on behalf of Govt. for which also enrolled as an Advocate with the Bar Council of Assam, Nagaland, Meghalaya, Manipur etc., Gauhati High Court Gauhati.

14. Attended and successfully completed a legal course consisting of studies in International Law & Organizations, Practical & Treaty drafting at London, U.K. from January 1980 to May 1980

15. Member, Mizo Customary Law Committee, and also had been its Chairman during President Rule for September 1988

16. Chairman of Executive Committee, Legal Aid and Advice Board.

17. Chairman, State Level Screening Committee under the Prevention of illicit Traffic in Narcotic Drugs.

18. Members, Board of undergraduate studies, North Eastern Hill University Shillong to consider course and prospectus for

119

LLB course.

19. Member, Committee to review the Implementation of the recommendation of All India Committee on Jail Reforms.

20. Members, Mizoram Resources Mobilisation and Taxation Enquiry Committee.

21. Members, State Level Road Safety Council for Mizoram.

22. Member, Works Advisory Committee

23. Member, Supply Advisory Board for Assam Rifles in Mizoram

24. Member, Appellate Board for Water and Air Pollution in Mizoram.

Chief Justice High Court by his letter dated August 6, 1990 addressed to Minister of Law and Justice, Government of India forwarded the recommendations, including that of Srivastava, for appointment of Judges to the Gauhati High Court. The recommendation included the above quoted bio-data of Srivastava. Minister of Law and Justice addressed a letter dated September 10, 1990 to the Governor Assam bringing to his notice the names proposed by the Chief Justice of the Gauhati High Court and called-for his recommendations and those of the Governors and Chief Ministers of the North Eastern State. Shri D.D. Thakur Governor of Assam by letter dated October 20, 1990 conveyed his views and those of other Governors and Chief Ministers of North Eastern State. He recommended Srivastava's name and also sent his bio-data (reproduced above) along with his recommendation. The Intelligence Bureau Ministry of Home Affairs Government of India informed the Law Ministry on October 8, 1990 that Srivastava was considered to be professionally competent and nothing adverse regarding character, integrity and political affiliation had come to notice. The original file regarding appointment of Judges in the Gauhati High Court with all the proposals was sent to the Chief Justice of India. The file containing all the recommendations including that of Srivastava along with his bio-data was considered by the Chief Justice of India on November 7, 1990. Regarding Srivastava he recorded as under:

120

"Shri K.N.Srivastava is a judicial officer, there is nothing adverse against him but his C.R. is not available ...After the CRs of Sri K.N. Srivastava and Shri N.G.Das are obtained the file may be sent to me...."

The file was again sent to the Chief Justice of India along with CRs of Srivastava. The Chief Justice cleared the name of Srivastava in the following words:

"So far as Srivastava is concerned he is a Judicial Officer and there is no objection. His name is, therefore, cleared."

The Minister of Law and Justice approved Srivastava's appointment as a Permanent Judge of Gauhati High Court on August 14, 1991. Thereafter a summary was prepared by the Department of Justice for the consideration of the Prime Minister and the President of India. In the said summary Srivastava was presented as under:

"Shri K.N. Srivastava B.A., LL.B. was born on 30th January, 1938. He joined Government of Assam in

Law Department in 1956. He was appointed as an Under Secretary, Law and Judiciary in 1972 and as Registrar of Firms and Societies, Government of Mizoram, from 23.3.72 to 21.12.79. He was appointed the Legal Remembrancer and Secretary, Law and Judiciary in 1985".

The Prime Minister approved the appointment of September 24, 1991 and the President of India on September 30, 1991. The Warrant of Appointment was signed by the President on October 15, 1991 and notification appointing Srivastava as a Judge, Gauhati High Court was issued on October 25, 1991.

Kumar Padma Prasad, a practising advocate, filed a writ petition under Article 226 of the constitution of India before Gauhati High Court on October 23, 1991 challenging the selection of Srivastava for appointment as a Judge of the Gauhati High Court on the ground that he was not qualified for such an appointment. He prayed for issuance of a mandamus directing the Union of India and other respondents to re-call, rescind or otherwise forbear from giving effect to the impugned selection of Srivastava.

121

for being appointed as a Judge of the Gauhati High Court. The writ petition was listed the same day for hearing before a learned single Judge of the High Court. The learned Judge issued rule nisi and passed interim order in the following terms:

"The stay matter shall be heard on 28.10.1991. Meanwhile the respondent No. 1 Union of India, is restrained from issuing warrant appointing the respondent No.9 (Shri K.N. Srivastava) as Judge of the Gauhati High Court till 28.10.1991."

On October 28, 1991 the High Court noticed the fact that the warrant of appointment of Srivastava had already been received at Gauhati. The petitioner was permitted to amend the writ petition and the hearing on the interim relief was adjourned to November 6, 1991. A Division Bench of the High Court heard the stay matter on November 6, 1991. After noticing the points raised by the petitioner the High Court observed as under:

"In view of above discussion, it is doubtful if the respondent a Shri K.N. Srivastava possesses qualification as provided under Clause (2) of Article 217. Therefore, a bona fide dispute has been raised, thereby showing a prima facie case."

The High Court granted the interim stay in the following words:-

"In the result, it is ordered and directed that the warrant of appointment of respondent 9 Shri K N Srivastava issued by the President of India shall not given effect to by the concerned respondent until further orders. It is further ordered and directed the respondent-9 Shri K.N. Srivastava is restrained from making and subscribing his oath or affirmation in terms of Article 219 of the Constitution until further orders. However, notwithstanding the pendency of the writ petition and making this interim order, the Central Government is given liberty to reconsider the appointment of respondent-9 Shri K.N. Srivastava as Judge in a High Court keeping in view the allegation made in this writ petition."

We may at this stage notice another controversy taken-up by the High Court on Judicial side. The Mizoram Bench of Gauhati High Court consisting of S.K. Homchaudhuri and M.

Sharma, JJ suo-moto assumed

122

jurisdiction on the judicial side presumably under Article 226 of the Constitution of India and on November 20, 1990 passed the following order:-

"Register a case under public interest litigation with the cause title- The Registrar (Judicial), Gauhati High Court Versus - Shri K.N. Srivastava, Secretary, Law & Judicial Deptt Govt. Mizoram, Aizawl.

Let notice be issued to Shri K.N. Srivastava, Secretary, Law & Judicial Department, Govt. of Mizoram show cause as to why an investigation shall not be ordered by this Court in the matter of purchase of Law Books and journals, furniture and stationery articles, by the Law and Judicial Department, Mizoram for the permanent Bench of the High Court at Aizawl; or why such further or other orders should not be passed as to this court may seem fit and proper.

In the interim, we direct the Secretary, Law and Judicial Department, Govt. of Mizoram to furnish a full particulars of the law books and journals purchased for the Judge's library positively within 7(seven) days from the date of receipts of this notice. The particulars should contain amongst others-(1) total amount of fund allotted by the Govt. and the fund spent with list of law books purchased, names and particulars of the suppliers and the price thereof, (3) copies of the bills of the suppliers, (4) date of payment to the suppliers, and (5) date of receipt of the books against each payment made etc.

The notice of Shri K.N. Srivastava, Secretary Law and Judicial Department shall be accompanied by copies of letter dated 23-7-1990 and the subsequent reminders.

Let a copy of this order be sent to (1) the Advocate General, Mizoram, (2) Chief Secretary to the Govt. of Mizoram, (3) The Secretary to the Govt. of India, Ministry of Home Affairs, New Delhi, and (4) The Secretary to the Govt. of India, Ministry of Law and Justice, New Delhi."

The above quoted directions were used by the High Court after

123

taking note, in the same order, of the following facts:-

"After the permanent Bench was established, regular Benches, both Division and Single, are sitting at Aizawl. But the great difficulties are faced by the Judges in discharging their function of not having the Judge's library equipped with essential law books and journals. Indeed, we are handicapped while sitting in the Court when reference books and Law journals are not available in deciding important and complicated question of lawA casual look at the library which mostly filled up with books of law and Judicial Department purchased earlier, do not at all disclose that a sum of Rs. 6,45,000- and odd was spent for purchase of law books and journals. Important law journals like- All India Reporters, Supreme Court Reports, Supreme Court Cases etc. do not appear to have been purchased for the libraryThe aforesaid facts and circumstances and the unusual silence of the

Secretary, Law & Judicial Department as regards furnishing of particulars of the Books and journals purchased for the Judge's Library for more than 4 months, inspite of repeated reminders, gives rise to strong suspicion that all is not well in the matter of purchase of law books and journals for the Judge's Library by the Law & Judicial Department. The Secretary Law is in duty bound to furnish full particulars of the law books and journals so purchased for the Judge's Library and is primarily accountable for anomalies, misuse, or misappropriation, if any, of the fund sanctioned by the Govt. for purchase of books for Judge's Library and the consequent non availability of the essential law books and journals, is very much detrimental to the function of the High Court and in turn to the interest of the public at large."

We fail to appreciate the action of the two learned Judges of the High Court in assuming jurisdiction on the judicial side to probe into a matter which was purely of administrative nature and was exclusively within the purview of the Chief Justice. Whether in the matter of purchase of books for the High Court, Srivastava acted honestly or dishonestly was not a matter for the learned Judges to probe by straining their judicial powers. Mr. K. K. Venugopal, learned senior Advocate appearing for Srivastava contended that Srivastava's name for appointment as a Judge was

124

recommended in August 1990 and by November, 1990 the process of consultation was at final stages. According to him the order dated November 20, 1990 was passed by the learned Judges with a view to stall his appointment as a Judge. Be that as it may, we are of the view that there was no justifiable reason for the learned Judges to have adopted the course they did.

The Mizoram Bar Association passed a resolution on October 7, 1991 wherein it was resolved as under:

"While a qualified person Shri R.C.Thanga presently Advocate General, Mizoram is excluded at the last stage under mysterious and suspicious circumstances, a person Shri K.N. Srivastava. who has no practical experience even for a day as a Magistrate or as an advocate, and against whom three misappropriation cases are pending in the High Court, (Aizawl Bench) and whose integrity is seriously being questioned, is considered to be qualified for appointment as a Judge of Gauhati High Court in the near future. This Bar Association vehemently urge the concerned authorities to reconsider or review the matter."

Shri Lal Thanhawla, Chief Minister Mizoram, by his letter dated October 7, 1991 addressed to Shri K. Vijaya Bhaskara Reddy, Minister of Law, Justice and Company Affairs, Government of India, New Delhi stated as under:

"We had recommended Shri K.N. Srivastava, Secretary, Law and Judicial, Government of Mizoram for being considered for appointment as a Judge of the Gauhati High Court. Subsequent to our recommendation it has been reported that a vigilance case has been instituted against Shri Srivastava by the Aizawl Bench of the Gauhati High Court in regard to alleged anomalies in the procurement of law books, journals etc. for the Aizawl Bench's library.

We understand that the case is pending with

the Gauhati High Court. I have, therefore, thought it desirable to bring this fact to your kind notice."

125

Shri U.L. Bhat, Chief Justice, Gauhati High Court by his letter dated October 8, 1991 addressed to the Law Minister Government of India stated:

"I am indeed happy that President has approved the names of four persons for appointment of Judges in the Gauhati High Court namely, (1) Shri Dhirender Nath Baruah (Assam-Bar) Shri Sujit Barman Roy (Tripura-Bar), (3) Shri K.N. Srivastava (Mizoram- service) and (4) Shri Nai Gopal Das (Tripura-SERVICE)."

The Chief Justice did not mention anything about the pendency of vigilance cases or any other case against Srivastava. The Law Minister after noticing the contents of both the letters opined that the contents of the Chief Minister's letter be ignored.

The Chief Secretary, Government of Mizoram by a wireless message dated November 2, 1991 informed the Secretary to Government of India, Department of Justice that Keshari Nandan Srivastava, Secretary, Law and Judicial Department, Government of Mizoram had been placed under suspension in view of the case pending against him in Gauhati High Court on corruption charges and other serious complaints against him on corrupt practices. It was further requested that the Government of India should consider cancelling his appointment as permanent Judge of the Gauhati High Court till allegations against him were thoroughly inquired.

Srivastava filed special leave petition against the High Court order, transfer petition seeking transfer of writ proceedings pending in Gauhati High Court and also writ petition under Article 32 of the Constitution of India. By an order dated November 20, 1991 this Court withdrew the writ petition, filed by Kumar Padma Prasad, from the file of the Gauhati High Court and transferred the same to this Court. This is how the matter is before us.

Mr. Anil Diwan, learned senior advocate appearing for Kumar Padma Prasad and Shri Ram Jethmalani, learned Senior Advocate for the State of Mizoram have raised the following points for our consideration:

1. Srivastava's appointment as a Judge of Gauhati High Court is violative of Article 217(2) of the constitution of India as he does not fulfill

126

the qualifications prescribed therein. Admittedly he has not been an advocate of a High Court for at least ten years. The bio-data of Srivastava before the authorities does not show that he ever held a judicial office in the territory of India.

2. Srivastava has produced during the course of arguments, a notification issued by the Government of Mizoram showing that he was appointed as Assistant to the Deputy Commissioner Aizawl District during the year 1979 and he worked as such for about 6/7 months. It is contended by the learned counsel that by virtue of his appointment as Assistant, in addition to his own duties as Under Secretary, Law and Judicial, Srivastava did not hold a judicial office as envisaged under Article 217(2) of the Constitution.

3. There has been no consultation amongst the constitutional authorities as required under Article 217(1) of the Constitution of India. It was contended that the Gauhati High Court Order dated November 20, 1990, the letter

from Chief Minister Mizoram dated October 7, 1991 addressed to the Minister, Law and Justice and the factum of pendency of vigilance inquiry against Srivastava were some of the important and relevant material which was not brought of the notice of the constitutional authorities and as such the process of consultation is vitiated. Relying on S.P.Gupta and Ors., etc. etc. v. Union of India and Ors., etc. etc., [1982] 2 S.C.R 365, It is contended that there has to be "full and effective consultation" on "full and identical facts". The same material must be present before the Constitutional functionaries whose consultation is mandatory under Article 217(1) of the Constitution of India.

We may notice Article 217(2) of the Constitution of India which lays down the qualifications for appointment as a Judge of a High Court.

"217(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 of two or more such Courts in succession;

127

Explanation - For the purposes of this clause -

(a) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate of a High Court or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law;

(aa)

(b)"

It is not disputed that Article 217(2)(b) is not attracted as admittedly Srivastava has not been an advocate of a High Court for at least 10 years. The question for our consideration is whether he has for at least 10 years held a judicial office in the territory of India as provided under Article 217(2)(a) or read with (a) to the explanation therein.

Expression "Judicial Office" has not been defined under the Constitution, nevertheless, it has to be given the meaning in the context of the concept of judiciary as enshrined in the Constitution of India. The constitution seeks to establish an independent judiciary in the country. Article 50 of the Constitution gives a mandate that the State shall take steps to separate the judiciary from the executive in the public services of the State. Chapter V and VI in Part VI of the Constitution provide for the High Courts and subordinate courts in the State. The Scheme under the Constitution for establishing an independent judiciary is very clear. Article 236(b) defines 'judicial service' to mean district Judges and Judges subordinate thereto. Under Article 234 the Governor of the State makes appointments of persons other than District Judges to the judicial service in accordance with the Rules made by him in consultation with the High Court. Article 235 vests control over district courts and courts subordinate thereto in the High Court. The judicial service whether at the level of district courts or courts subordinate thereto is under the control of the High Court in all respects. The subordinate judiciary which mans the courts subordinate to the district courts consists of judicial officers who are recruited in

consultation with the High Court. The district judges are recruited for amongst the members of the bar and by promotion from the

128

subordinate judiciary. The judicial service in a State is distinct and separate from the other services under the executive. The members of the judicial service perform exclusively judicial functions and are responsible for the administration of justice in the State. We may at this stage refer to the relevant articles of the Constitution which are as under:

"233. Appointment of district judges. - (1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

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

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

236. Interpretation. In this Chapter -

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

(b) the expression "Judicial service" means a service consisting exclusively of persons intended to fill the post of district

129

judge and other civil judicial posts inferior to the post of district judge.

In *Chandra Mohan v. State of Uttar Pradesh & Ors.*, [1967] 1 SCR 77 this Court had an occasion to construe the above quoted provisions of Chapter VI Part VI of the Constitution of India. Subha Rao, CJ speaking for the Court held as under:

"The Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States; 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 case the Government, 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 contact with the people, and it is no less important, perhaps indeed even more important, that their independence should be placed beyond question than 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 Ch. VI of Part VI under the heading "Subordinate Courts". But at the time the Constitution was made, in most of the State the magistracy was under the direct control of the executive. Indeed it is common knowledge that in the preindependent India there was a strong agitation that the judiciary should be separated from the executive and that the 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."

"...the real conflict rests on the question whether the Governor can appoint as district judges persons from services other than

130

the judicial service; that is to say, can he appoint a person who is in the police, excise, revenue or such other service as a district judge? The acceptance of this position would take us back to the preindependence days and that too to the conditions prevailing in the Princely States. In the Princely States one used to come across appointments to the judicial service from police and other departments. This would also cut across the well-knit scheme of the Constitution and the principle underlying it, namely, the judiciary shall be an independent service. Doubtless, if Art. 223 (1) stood alone, it may be argued that the Governor may appoint any person as a district judge, whether legally qualified or not, if he belongs to any service under the State. But Art. 233(1) is nothing more than a declaration of the general power of the Governor in the matter of appointment of district judges. It does not lay down the qualifications of the candidates to be appointed or denote the sources from which the recruitment has to be made. But the resources of recruitment are indicated in cl.(2) thereof. Under cl.(2) of Art. 233 two sources are given, namely, (i) persons in the service of the Union or the State, and (ii) advocate or pleader. Can it be said that in the context of Ch. VI of Part VI of the Constitution "the service of the Union or of the State" mean any service of the Union or of the State or does it mean the judicial service of the Union or of the State? The setting, viz., the chapter dealing with subordinate courts, in which the expression "the service" appears indicates that the service mentioned therein the service pertaining to courts. That apart, Art. 236(b) defines the expression "judicial service" to mean a

service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge. If this definition, instead of appearing in Art. 236, is placed as a clause before Art. 233(2), there cannot be any dispute that "the service" in Art. 233(2) can only mean the judicial service. The circumstance that the definition of "judicial service" finds a place in a subsequent Article does not necessarily lead to contrary conclusion. The fact that in art. 233(2) the expression "the service" is used whereas in Arts. 234 and 235 the expression "judicial service" is found is not decisive of

131

the question whether the expression "the service" in Art. 233(2) must be something other than the judicial service, for, the entire chapter is dealing with the judicial service. The definition is exhaustive of the service. Two expressions in the definition bring out the idea that the judicial service consists of hierarchy of judicial officers starting from the lowest and ending with district judges. The expressions "exclusively" and "intended" emphasise the fact that the judicial service consists only of persons intended to fill up the posts of district judges and other civil judicial posts and that is the exclusive service of judicial officers. Having defined "judicial service" in exclusively terms, having provided for appointments to that service and having entrusted the control of the said service to the care of the High Court, the makers of the world Constitution not have conferred a blanket power on the Governor to appoint any person from any service as a district judges."

This Court has thus authoritatively laid down that the appointment of district judges under Article 233(2) can only be from the judicial service of the State as defined under Article 236(b) of the Constitution.

It is in the above context that we have to interpret the meaning of expression "judicial office" under Article 217(2)(a) of the Constitution of India. The High Court Judges are appointed from two source, members of the Bar and from amongst the persons who have held "judicial office" for not less than ten years. Even a subordinate judicial officer manning a court inferior to the District Judge can be appointed as a Judge of a High Court. The expression "judicial office" in generic sense may include wide variety of offices which are connected with the administration of justice in one way or the other. Under the Criminal Procedure Code 1973 powers of judicial Magistrate can be conferred on any person who holds or has held any office under the Government. Officers holding various posts under the executive are often vested with the Magisterial-powers to meet a particular situation. Did the framers of the constitution had this type of 'offices' in mind when they provided a source of appointment to the high office of a Judge of High Court from amongst the holders of a "judicial office". The answer has to be in the negative. We are of the view that holder of "judicial office" under Article 217(2)(a) means the person who exercises only judicial

132

functions, determines causes inter-parties and renders decisions in a judicial capacity. He must belong to the

judicial service which as a class is free from executive-control and is disciplined to uphold the dignity, integrity and independence of judiciary.

This Court in Chandra Mohan's case (supra) has held that "Service...of the State" in Article 233(2) means the judicial service as defined under Article 236(b) of the Constitution. Therefore, a person - who is holding a judicial office in the generic sense and is not a member of the judicial service of the State - is not eligible to be appointed as District Judge. Can such person be qualified for appointment as a Judge of a High Court? An affirmative answer will not be in conformity with the scheme of Chapter V and VI of Part VI of the Constitution and will also go contrary to the ratio in Chandra Mohan's case. When a person is not eligible to be appointed as a District Judge it would be mockery of the Constitution to hold that he is eligible to be appointed as a Judge of a High Court. The constitutional-scheme is clear. Independence of judiciary is the basic feature of the Constitution. To achieve that objective there has to be separation of judiciary from the executive. The judicial service under Article 236(b) consists of District Judges who preside over the District courts and the Subordinate Judges who man the courts inferior to the District Court. Subordinate Judges who are member of the judicial service are eligible for appointment as District Judges. It would be logical and consistent with the constitutional scheme to read "judicial office" under Article 217(2)(a) to mean an office within the judicial service of the State. Ordinarily the District Judges who are superior members of the judicial service are considered for appointment as Judges of the 'High Court but the constitution-makers wanted to hold-out a possibility of elevation as a Judge of High Court to the Subordinate Judges, so as to infuse amongst them a sense of responsibility and an incentive for maintaining efficiency and it was with that objective that the expression "judicial office" has been used in Article 217(2)(a) of the Constitution. In our view the expression "judicial office" in the said article means an office which is a part of judicial service as defined under Article 236(b) of the Constitution.

In *Statesman (Private) Ltd. v. H.R. Deb & Ors.*, [1968]3 SCR 614, the question before this Court was whether a Sub-Deputy collector vested with the powers of a first magistrate was a judicial officer in terms of

133

Section 7(3)(d) of the Industrial Disputes Act. The said section provides that a person shall not be qualified for appointment as the presiding officer of a labour court unless he has held any judicial office in India for not less than 7 years. H.R. Deb was holding office of the Sub-Deputy Collector and was vested with magisterial powers which he enjoyed for about nineteen years. He was appointed presiding officer of a labour court. His appointment was challenged on the ground that he had not held judicial office for 7 years prior to his appointment. Hidayatullah, C.J. who spoke for the Court held that since a magistrate exercises judicial functions he holds a judicial office. Whether his duties are partly judicial and partly other does not in any way detract from the position that while acting as a magistrate he is a judicial officer. On these findings the appointment of H.R. Deb as a labour officer was upheld. While holding so the learned Chief Justice observed as under:

"Nor does the argument that magistrates will claim

to be appointed Judges of the High Court need detain us. the scheme of Chapter V of Part VI of the Constitution has its own affect on the meaning of the expressions 'judicial office' and 'judicial service'. In any case the use of the same expression in any other enactment not in pari materia can have no bearing upon the Industrial Disputes Act and vice versa. In the Constitution these words must bear the meaning which the context dictates and in that connection the history of appointment of Judges cannot be overlooked."

It is thus, clear that the expression "judicial office" under Article 217(2)(a) of the Constitution has to be interpreted in consonance with the scheme of Chapter V and VI of Part VI of the Constitution. We, therefore, hold that expression "judicial office" under Article 217(2)(a) of the Constitution means a "judicial office" which belongs to the judicial service as defined under Article 236(b) of the Constitution of India. In order to qualify for appointment as a Judge of a High Court under Article 217(2)(a) a person must hold a "judicial office" which must be a part of the judicial service of the State.

We may now examine whether Srivastava is qualified for appointment as a Judge of a High Court on the basis of the offices held by him as

134

detailed in his bio-data reproduced above. The Constitution of India in clear terms lays down the qualification for appointment as a Judge of a High Court. The Chief Minister/Chief Justice selected Srivastava for recommending his name for appointment as a Judge of Gauhati High Court. Obviously on their asking Srivastava submitted his bio-data which we have re-produced above and which is part of the appointment files maintained in the High Court and in the Ministry of Law, Government of India. Srivastava mentioned therein that he belongs to "Mizoram Judicial Service" thereby giving in an impression that he has had held judicial offices as a member of the judicial service of Mizoram. This is not a correct representation. Mizoram Judicial Service Rules, 1986 came into force with effect from November 17, 1986. These Rules were superseded by the Mizoram Judicial Service Rules, 1989 (1989 Rules) framed under Article 309 read with Articles 233 and 234 of the Constitution of India in consultation with the Gauhati High Court. These Rules were enforced with effect from February 17, 1986. Under the 1989 Rules various posts in different grades were created. Schedule-A to the 1989 Rules which give the composition of the Service is an under:

SCHEDULE - A

(See rule 2(g) and rule 4)

Grade & Post

Sl. No.

1. GRADE I

(a) SENIOR

1) Legal Remembrancer-cum-Secy., Law & Judicial.

2) Registrar, High Court

3) District & Sessions Judge

(b) JUNIOR

4) Joint Legal Remembrancer cum

Jt. Secretary. Law & Judicial

5) Special Judge

135

II GRADE II

1) Chief Judicial Magistrate

2) Dy. Legal Remembrancer-Cum-Deputy Secretary, Law & Judicial

- 3) Deputy Registrar, High Court
- 4) Assistant District & Sessions Judge
- III GRADE III
- 1) Asstt. Legal Remembrancer-Cum-Under Secretary, Law & Judicial
- 2) President & Recorder, District Council Court, Aizawl.
- 3) Sub-Divisional Judicial Magistrate
- 4) Assistant Registrar, High Court
- 5) Judicial Officer I, District Council Courts, Aizawl and Magistrate Subordinate District Council Courts in Aizawl and Lunglei Districts.
- IV GRADE IV
- 1) Munsiffs/Judicial Magistrates
- 2) Magistrate Cum Judicial Officer II, Additional Subordinate District Council Courts in Aizawl & Lunglei Districts.
- 3) Special Officer-Cum-Assistant Draftsman
- 4) Translator"

Srivastava, according to his bio-data, was appointed legal Remembrancer-Cum-Secretary, Law & Judicial in 1985 and has been working as such since then. It is on this basis that he claims to be a member of Mizoram Judicial Service constituted under the 1989 Rules is a service envisaged under Article 236(b) of the Constitution of India, we assume it to be so for the purposes of the present controversy. Schedule A to the 1989 Rules enumerates various 'judicial offices' such as District & Sessions

136

Judge (Grade I), Chief Judicial Magistrate (Grade II), Sub-Divisional Judicial Magistrate, Judicial officer and Magistrates (Grade III) and munsiffs/Judicial Magistrates, Magistrate-cum-Judicial officer II (Grade IV). It is not disputed that Srivastava never held any of these offices. He, however, claims that since he has been holding the office of Legal Remembrancer-cum-Secretary Law & Judicial, he is member of the Mizoram Judicial Service. That may be so but unless he has held a judicial office in a judicial service he does not come within the purviews of Article 217(2)(a) of the Constitution. The office of Legal Remembrancer-cum-Secretary Law and Judicial office under the control of the executive. In any case the Mizoram Judicial Service came into existence with effect from February 17, 1986 and even if full benefit of that service is given to Srivastava for the purposes of Article 217(2)(a) he is not qualified as the total period counted from February 17, 1986 comes to less than ten years as required under the said Article. Srivastava, his bio-data, under the said heading 'professional experience', has listed 24 various offices held by him during the course of his career. A bare look into the list shows that none of those offices were/are judicial offices even in the generic sense. The office of D.C.(Judicial) claimed to have been held by Srivastava in the year 1987 is again of no consequence because even if we assume the said office to be judicial office in judicial service the period counted from 1987 would not make the requisite period of ten years under the Constitution. All the other officer listed in the bio-data are neither judicial nor part of any judicial service. All those offices were/are under the employment and control of the Executive. We, therefore, agree with Mr. Anil Diwan and Mr. Ram Jethmalani that assuming every word of Srivastava's bio-data to be correct he is not qualified for appointment as a judge of a High Court.

It is for the first time in the post-independent era that this Court is seized of a situation where it has to

perform the painful duty of determining the eligibility of a person who has been appointed a Judge of High Court by the President of India and who is awaiting to enter upon his office. We looked into the official record and permitted learned counsel for the parties to examine the same. We are at a loss to understand as to how the bio-data of Srivastava escaped the scrutiny of the authorities during the process of consultation under Article 217(1) of the Constitution of India.

137

A cursory look at the bio-data would have disclosed that Srivastava was not qualified for appointment as a Judge of the High Court on the admitted facts which have been on the official files all the time. Needless to say that the independence, efficiency and integrity of the judiciary can only be maintained by selecting the best persons in accordance with the procedure provided under the Constitution. These objectives enshrined under the Constitution of India cannot be achieved unless the functionaries accountable for making appointments act with meticulous care and utmost responsibility.

Mr. Anil Diwan and Mr Ram Jethmalani vehemently argued that in case we come to the conclusion, as we have, that - on the basis of the bio-data taken into consideration by the constitutional authorities - Srivastava is not qualified for appointment as a Judge of a High Court then his appointment be quashed on the grounds that there has been violation of Article 217(2) of the constitution and there was total lack of application of mind on the part of the authorities responsible for making the appointment. We can adopt this course but after hearing Mr Venugopal, learned senior advocate appearing for Srivastava we refrain from doing so and intend going into further material placed on record by Srivastava to show that notwithstanding his bio-data before the authority he is qualified to be appointed as a Judge of the High Court. We are fully aware of the delicacy and sensitivity of the matter and the stage at which the matter has been brought before us for judicial scrutiny. We make it clear that ordinarily the domain in such matters lies wholly with the constitutional authorities mentioned in Article 217 of the Constitution, but in exceptional circumstances like the present, where the incumbent considered for appointment as a Judge of High Court does not fulfill the qualification as laid down expressly under the provisions of the Constitution itself, it becomes our bounded duty to see that no person ineligible or unqualified is appointed to a high constitutional and august office of a Judge of a High Court. Thus taking in view the entire facts and circumstances of the case and in order to do full justice to Srivastava we gave him full opportunity to place any fresh material before us to justify that he was qualified for appointment as a Judge of a High Court even though such material had not been brought to the notice of the constitutional authorities.

During the course of arguments Srivastava has filed additional affidavit

138

and placed documents before us, which were not before the authorities, under Article 217(1) of the Constitution of India. Under Rules 8 and 15 of the Rules for the regulation of the procedure of officers appointed to administer justice in the Lushai Hills promulgated on March 25, 1937 (hereinafter called '1937 Rules'). Srivastava was appointed as Assistant to the Deputy Commissioner Aizawl District by the Lt. Governor (Administrator) of Mizoram. He was

invested under Rule 9 of the 1937 Rules with the powers analogous to the powers of a judicial magistrate of the First Class as defined in the Code of Criminal Procedures, 1973. In support of his contention he has produced the notification dated June 23, 1979 which is reproduced hereunder :

"NOTIFICATION"

Dated Aizawl, the 23rd June 1979

No.CS/MZ/APPT/79 : Under rules 8 and 15 of the Rules for the regulation of the procedure of officers appointed to administer justice in the Lushai Hills, published vide Notification No.2530(a)A.P. dated 25th March 1937 the Lt. Governor (Administrator) of Mizoram is pleased to appoint the following Officers as Assistant to the Deputy Commissioner, Aizawl District and further to invest under rule 9 of the aforesaid Rules With the powers analogous to the power of Judicial Magistrate of the First Class defined in the Code of Criminal Procedures, 1973 (Act No. 2 of 1974) in addition to their duties.

Name of Officer	Designation
1. Shri M. Lalmanzuala	Secretary Appointment
2. Shri C, Lalchhuma	Secretary, Finance
3. Shri Khuanga	Director, L.A. T.P. & H
4. Shri Lalthamuama	Director, Supply & Tpt.
5. Shri M. Gasowaimi	Under Secy, P.W.D.
6. Shri S.P.Nag	Deputy Director, Fisheries
7. Shri Shushil Kumar	Deputy Director, C.D.
8. Shri K.N. Srivastava	Under Secy. Law & Judicial
9. Shri A.K. Ghose	Architect P.W.D.
10. Shri S.S, Dutta	Under Secy. Finance

139

Further in exercise of the powers conferred by sub-section (1) of section 20 of Code of Criminal Procedure, 1973 (Act 2 of 1974) read with the Notification of the Government of India, Ministry of Home Affairs No. 11 11/2/74-UTL (iii) (S.O. 185(E) dated the 20th March, 1974 the Lt. Governor (Administrator) is pleased to appoint the above mentioned officers as Executive Magistrates also in the Aizawl District.

Sd/- A.J. Kundan

Chief Secy. to Govt. of Mizoram"

Rules 1,8,9,10,14,15, and 19 of the 1937 Rules which are relevant for our purposes are reproduced hereunder:

"1. The administration of the district known as the Lushai Hills is vested in the Governor of Assam, and the Deputy Commissioner of the Lushai Hills and his assistants and in the chiefs and headmen of villages.

8. Criminal justice shall be ordinarily administered by the Deputy Commissioner and his Assistants.

9. The Deputy Commissioner shall be competent to pass sentence of death, transportation or imprisonment up to the maximum amount provided for the offence, of whipping, and of fine up to any amount provided that all sentences of death, transportation or imprisonment of seven years and upwards shall be subject to the confirmation by the Assam High Court.

The Assam High Court hereinafter referred to as the High Court of Deputy Commissioner may call for the proceedings of any officer subordinate to him and may reduce, enhance or cancel any sentence passed or remand the case for retrial but no offence shall be punished by a sentence exceeding

that awardable under the Indian Penal Code.

Assistant to the Deputy Commissioner shall exercise such powers as they may be invested with by the Governor of Assam not exceeding those of a Magistrate of the first class, as defined in the Criminal Procedure Code.

10. An appeal shall lie to the Deputy Commissioner against

140

any order passed by any of his Assistants.

An appeal shall lie to the High Court for any sentence passed by the Deputy Commissioner.

In respect of magisterial decisions of the Commandant of the Assam Rifles, the Superintendent shall exercise the appellate revisional powers conferred upon the Court of Sessions or the District Magistrate by the Code of Criminal Procedure in the case of decisions of the class of Magistrates with the powers of which the Commandant of Assam Rifles has been invested.

14. The deputy commissioner and all Magistrates shall keep such registers of criminal cases and submit such returns as the High Court shall from time to time prescribe.

RM60

15. The administration of civil justice in the Lushai Hills is entrusted to the Deputy Commissioner and his Assistants, who shall take special cognizance of well established Lushai Customs.

19. The High Court and the Courts of the Deputy commissioner and his Assistants shall be guided by the spirit of the Code of Civil Procedures, so far as it is applicable to the circumstances of the Lushai Hills and consistent with these Rules.

Mr. Venugopal contended that the administration of justice both on civil and criminal side was being manned exclusively by the Deputy Commissioner and his Assistants under the 1937 Rules. No other courts were functioning. Apart from administering criminal and civil justice the total administration of the district known as the Lushai Hills was vested in the Governor of Assam, the Deputy Commissioner of Lushai Hill, and his Assistants. The Deputy Commissioner under the 1937 Rules was competent to pass sentence of death, transportation or imprisonment up to a maximum provided for the offence and fine up to any amount. The Assistants to the Deputy Commissioner were to exercise such powers as conferred by the Government not exceeding those of a magistrate of the first class as defined under the Code of Criminal Procedure. An appeal lies to the Deputy Commissioner against any order passed by any of his Assistants.

141

Similarly under Rule 15 the administration of civil justice was entrusted to the Deputy Commissioner and his Assistants. Srivastava exercised the powers of Assistant to the Deputy commissioner from June 23, 1979 to December 19, 1979. According to Mr. Venugopal the office of the Assistant to which Srivastava of about six months was a judicial office. According to him period for which he held the judicial office and the quality of the said office are not relevant factors. He therefore, forcefully contended that Srivastava, having held the judicial office of Assistant to the Deputy Commissioner under the 1937 Rules fulfills the

qualification under Article 217(2)(a) read with (a) to the Explanation According to him all the office held by Srivastava after relinquishing the office of the Assistant to the Deputy Commissioner required special knowledge of law and as such whole of that period is liable to be included for counting 10 years during which he held a judicial office. Srivastava, according to him, is qualified for appointment as a judge of a High Court.

We have given our thoughtful consideration to the argument advanced by Mr. Venugopal. We are not inclined to agree with him.

Srivastava has been shown at serial at No. 8 in the notification dated June 23, 1979 reproduced above. The post held by him on that day was that of Under Secretary, Law and Judicial. While holding the said post he was appointed as Assistant to the Deputy Commissioner in addition to his own duties. He was further invested with the powers analogous to the powers of a judicial magistrate. He was also appointed as Executive Magistrate in the Aizawl District. In the said notification at serial No.9 is A.K. Ghose who was architect in the Public Works Department of the Government of Mizoram. Similarly at serial No. 2 is Secretary Finance. Serial No. 4 Director Supply and Transport, Serial No.5 Under Secretary P.W.D and No. 6 Deputy Director Fisheries. The very fact that officers from different departments were appointed as Assistants in addition to their duties is significant and clearly goes to show that there was no separate office with a designation of Assistant to the Deputy Commissioner on which these appointments were made. Keeping in view the exigency of administration different officers working with the Government of Mizoram were invested with the powers of judicial and executive magistrates by appointing them Assistants in addition to their own duties. It would be

142

travesty of justice if we hold that an Architect working in the P.W.D. department by virtue of his being vested with the powers of an Assistant in addition to his own duties comes to hold a "judicial office" in term of Article 217(2)(a) of the Constitution of India. There was no separation of judiciary from the executive under the 1937 Rules and the total administration of the area including administration of justice was being done by the officers who were under the control of the executive. There was no judicial service as envisaged by article 236(b) of the Constitution of India and as such an Assistant to the Deputy Commissioner could not be a judicial officer in terms of Article 217(2)(a) of the Constitution of India. There is no material before us to show that there was a regular cadre of Assistants at the relevant time. From the notification reproduced above it is obvious that the posts of Assistants to the Deputy Commissioner were not separately created and only officers working in various Government Departments were invested with the powers under the 1937 Rules in addition to their own duties. We have further no material before us to show that Srivastava in fact presided over any court and conducted any trial or decided any civil cases during the said period of six months. Rather there is an affidavit filed by Under Secretary, Law, Judicial and Parliamentary Affairs Department Government of Mizoram affirming that no post of Assistant to Deputy Commissioner was created during the relevant period. It is further stated in the said affidavit that Srivastava did not deal with or decide any case (civil or criminal) during that period.

Mr. Anil Diwan relying on Smt. Kanta Kathuria v. Manak

Chand Surana, [1969] 3 SCC 268 has contended that the judicial office under Article 217(1)(a) of the Constitution of India has to be an office which is subsisting permanent, substantive and which has an independent existence from the person who fills it. In Smt. Kanta Kathuria Case (supra) Sikri, J. (as he then was) who delivered the majority judgment referred to with approval the definition of word "office" given by Rowlatt, J. in Great Western Railway Company v. Bater 8 Tax Cases 231 which is in the following terms:

"Now it is argued, and to my mind argued most forcibly, that shows that what those who use the language of the Act of 1842 meant, when they spoke of an office or employment, was an office or employment which was an office or employment which was a subsisting, permanent,

143

Substantive position which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders; and if you merely had a man who was engaged on whatever terms, to do duties which were assigned to him, his employment to do those duties did not create an office to which those duties were attached. He merely was employed to do certain things and that is an end of it; and if there was no office or employment existing in the case as a thing, the so-called office or employment was merely an aggregate of the activities of the particular man for the time being. And I think myself that that is sound. I am not going to decide that, because I think I ought not to in the state of the authorities, but my own view is that the people in 1842 who use this language meant by an office a substantive thing that existed apart from the holder."

The word "office" has various meanings and we have to see which is appropriate meaning to be ascribed to this word in the context it appears in the Constitution. We are of the view that the framers of the Constitution did not and could not have meant by a "judicial office" which did not exist independently and the duties or part of the duties of which could be conferred on any person whether trained or not in the administration of justice. The word "Judicial office" under Article 217(2)(a) in our view means a subsisting office with a substantive position which has an existence independent from its holder.

We have already held that "judicial office" in Article 217(2)(a) means an office as a part of the judicial service as defined under Article 236(b) of the Constitution of India. The office of the Assistant to Deputy Commissioner held by Srivastava for a period of about six months under the notification reproduced above, was neither a judicial office nor was it part of a judicial service as defined under Article 236(b) of the Constitution of India. We, therefore, accept the second contention advanced by Mr. Anil Diwan and Ram Jethmalani and hold that Srivastava was not qualified for appointment as a Judge of a High Court under Article 217(2)(a) of the Constitution of India.

Before parting with the point under discussion we may notice

144

another argument advanced by Mr. Venugopal. He contended that there being no separation of judiciary in Mizoram and justice civil and criminal being solely administered by the

executive officers under the 1937 Rules they are judicial officers within the ambit of Article 217(2)(a) of the Constitution of India. We do not agree. Before independence the district judges were appointed by the Governor from three sources, namely, (1) the Indian Civil Service, (2) the Provincial Judicial Service and (3) the Bar. After independence recruitment to the Indian Civil Service was discontinued and the officers of the India Administrative Service which substituted the Indian Civil Service were not to be given judicial posts. The district judges have been recruited only from two sources (1) bar and (2) judicial service. There has been no case of a member of the executive having been promoted as a district judge. The independence of judiciary is part of the basic structure of the Constitution. The Directive Principles give a mandate that the State shall take steps to separate the judiciary from the executive which means that there shall be a separate judicial service free from the executive control. The constitution-scheme, therefore, only permit members of the judicial service as constituted in terms of Article 236(b) of the Constitution to be considered for the post of district judge and that of the High Court Judge. It would be useful to refer to Article 237 of the Constitution of India :

"237. Application of the provisions of this Chapter to certain class or classes of magistrate. The Governor may by public notification direct that the foregoing provisions of this Chapter and any rules made thereunder shall with effect from such date as may be fixed by him in that behalf apply in relation to any class or classes of magistrates in the State as they apply in relation to persons appointed to the judicial service of the State subject to such exceptions and modifications as may be specified in the notification."

In Chandra Mohan's case (supra) Subba Rao, CJ interpreted Article 237 in the following terms :

"Art. 237 enables the Governor to implement the separation of the judiciary from the executive. Under this Article, the Governor may notify that Arts. 233, 234, 235 and 236 of the this

145

Constitution will apply to magistrates subject to certain modification or exceptions; for instance, if the Governor so notifies, the said magistrates will become members of the judicial service, they will have to be appointed in the manner prescribed in Art. 234, they will be under the control of the High Court under Art. 235 and they can be appointed as District Judges by the Governor under Art. 233 (1). To state it differently, they will then be integrated in the judicial service which is one of the sources of recruitment to the post of district Judges. Indeed, Art. 237 emphasises the fact that till such an integration is brought about, the magistrates are outside the scope of the said provisions. The said view accords with the constitution theme of independent judiciary and the contrary view accepts a retrograde step."

It is thus obvious that the Magistrates who are not appointed to the judicial service of the State can be brought into the judicial service by way of a notification under Article 237 of the Constitution Of India. Till the time there is separation of judiciary or a notification under Article 237 of the Constitution of India is issued

there is no question of considering the executive officers or even Magistrates for appointment to the post of District Judge or a High Court Judge even though the executive officers or Magistrates concerned have the adornment of a judicial office. We, therefore, reject the contention of Mr. Venugopal.

The view we have taken on the first and the second points, the very interesting and learned discussion on the third point need not detain us and we express no opinion about it.

We allow transferred writ petition of Kumar Padma Prasad and declare that K.N. Srivastava, on the date of issue of warrant by the president of India, was not qualified to be appointed as a Judge of the High Court. As a consequence, we quash his appointment as a judge of the Gauhati High Court. We direct the Union of India and other respondents present before us not to administer oath or affirmation under Article 219 of the Constitution of India to K.N. Srivastava. We further restrain K.N. Srivastava from making and subscribing an oath or affirmation in terms of Article 219 of the Constitution of India and assuming office of the Judge

146

of the High Court. We direct the Registry to send a copy of this judgment to the President of India for his consideration and necessary action in terms of our judgment. There shall be no order as to costs.

R.P.

Petition allowed.

147