PETITIONER:
M.M. GUPTA AND ORS. ETC. ETC,

Vs.

RESPONDENT:
STATE OF JAMMU & KASHMIR & ORS.

DATE OF JUDGMENT15/10/1982

BENCH:
PATHAK, R.S.
BENCH:
PATHAK, R.S.
BHAGWATI, P.N.
SEN, AMARENDRA NATH (J)

CITATION:
1982 AIR 1579 1983 SCR (1) 593
1982 SCC (3) 412 1982 SCALE (2)913
CITATOR INFO :
R 1987 SC 331 (19,22,24,26)
RF 1992 SC1546 (17)

ACT:
Constitution of Jammu & Kashmir-Article 109 (corresponding to Article 233 of the Constitution of India)-Scope of-Promotion of subordinate judges as District Judges-High Court's recommendations rejected by the State Government-Promotions and appointments made on recommendations of Cabinet Sub-Committee-Validity of.

Consultation-What amounts to-Counter-proposals of State Government without communicating them to the High Court-Whether could be treated as consultation.

Seniority-Whether could be the only criterion for promotions.

Procedure-High Court declined to hear writ petition against its own administrative decision on grounds of propriety-Granted certificate of fitness to appeal with consent of both parties-State, if could raise objection as to validity of certificate at the time of appeal-Supreme Court, if has power to revoke the certificate and grant special leave and hear the appeal.

Per Bhagwati and Amarendra Nath Sen, JJ. (Pathak, J. concurring in the result)

HEADNOTE:
Independence of the judiciary is one of the basic tenets and a fundamental requirement of our Constitution. Various articles of the Constitution provide or safeguarding the independence of the judiciary. Article 50 provides separation of the judiciary from the executive.

For some time past there appears to be a trend of interference by the executive, both at the State and Central levels, in judicial appointments. This has resulted in prolonged and unnecessary delay in making the appointments to judicial offices. For various reasons judicial offices have ceased to attract talented members of the Bar and even when competent members of the Bar are persuaded to accept the office of a High Court Judge or of a District Judge they eventually withdraw their consent both because of the inordinate delay in making the appointments as well as of

the various restrictions sought to be imposed.
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Article 235 of the Constitution vests control of the judicial administration completely in the High Court except in certain circumstances. In these matters the constitutional requirement is that the Governor must act in consultation with the High Court. If, in the matter of these appointments, the High Court is sought to be ignored and the executive chooses to make the appointments, the independence of the judiciary would be affected. It is necessary that healthy conventions and proper norms should be evolved for safeguarding the independence of the judiciary in conformity with the requirements of the Constitution.

Normally, as a matter of rule, the recommendations made by the High Court for the appointment of a District Judge should be accepted by the State Government and the Governor should act on the same. Where the State Government does not agree with the recommendations of the High Court it should communicate its views to the High Court so that the High Court may consider the matter once again. The State Government must have complete and effective consultation with the High Court in the matter. Efficient and proper judicial administration being the main object of these appointments, there should be no difficulty in arriving at a consensus as both the High Court and the State Government must necessarily approach the question in a detached manner for achieving the objective of getting proper District Judges for the due administration of justice.

Facts :

To fill up four vacancies of District Judges in the State, the High Court, after considering the merit and suitability of 12 eligible officers in the cadre of Sub-Judges, recommended four names to the Governor. The State Government asked the High Court to send the confidential reports of all the officers considered for the post. While sending the reports, the High Court had also sent its comments justifying the selection and set out in detail the reasons for supersession of senior officers. However on the basis of the recommendations of a Cabinet Sub-Committee constituted by the State Government to make its recommendations on this point, the Law Secretary communicated to the Registrar of the High Court approval of the Governor for the promotion and appointment as District and Sessions Judges certain officers other than those recommended by the High Court. While giving postings to them the High Court recorded a minute that their postings "should not be deemed as consultation with it in terms of Article 109 of Jammu & Kashmir Constitution.

Four of the Sub-Judges whose names had been recommended by the High Court for appointment as District and Sessions Judges but were rejected by the Government, filed a writ petition in the High Court questioning the validity of the Government's action. In that petition, the High Court was made one of the respondents.

On the question whether it would be proper for the High Court to hear a writ petition impugning an order passed by it in its administrative capacity, with the consent of both the petitioners and the respondent-State, the High Court declined to hear the petition. Since, however, the respondent-State did not
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have any objection to grant to the petitioners a certificate of fitness to file an appeal in this Court, the High Court granted the certificate holding that the petition involved interpretation of Article 109 of the Constitution of Jammu &

Kashmir and also that it raised a substantial question of law of general public importance.

Meanwhile the State obtained special leave to appeal against the order of the High Court alleging that the High Court had not decided any point raised in the writ petition on the ground of judicial propriety and that therefore the High Court should not have granted the certificate of fitness to appeal.

The petitioners in the High Court had also filed a writ petition under Article 32 of the Constitution for substantially the same reliefs claimed by them in their writ petition in High Court.

It was contended on behalf of the appellants that Article 233 (which corresponds to Article 109 of the Constitution of Jammu & Kashmir and which has been judicially interpreted by this Court in a number of cases) deals with appointment, posting and promotion of District Judges but does not deal with promotion of subordinate judges to the post of District Judges and that promotion of subordinate judges is vested in the High Court and that therefore appointments made by the Government without consulting the High Court were void

The State on the other hand contended that consultation contemplated by this Article does not mean either concurrence or recommendation and no particular form or procedure was necessary to be followed by the Governor for consultation with the High Court and that in this case all the material which the High Court had submitted to the Governor amounted to consultation within the meaning of the Article.

Allowing the appeal,

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HELD : On a proper interpretation of Articles 109 and 111 of the Constitution of Jammu & Kashmir, the Governor is the competent authority to appoint District Judges and the power of appointment is not vested in the High Court. This is settled by a long line of decisions of this Court. [609 E-F]

Merely because the power of appointing these officers is vested in the Governor, it cannot be said that it would lead to the subservience of the judiciary to the executive and the independence of the judiciary would be undermined. The power to make the appointments conferred on the Governor has to be exercised by him in consultation with the High Court. This provision has been incorporated in the Constitution to safeguard the independence of the judiciary. [609 C-D]

It is equally well settled that 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

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their views. If one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the proposer, the direction to give effect to the counter-proposal, without anything more, cannot be said to have been done after consultation. [625 B-C]

Chandra Mohan v. State of Uttar Pradesh, [1967] 1 S.C.R.77, Chandra mouleshwar Prasad v. Patna High Court & Ors., [1970] 2 S.C.R. 66, High Court of Punjab and Haryana etc. v. State of Haryana, [1975]3 S.C.R. 368; followed.

In the instant case the counter-proposals sought to be made by the Government in the matter of these appointments were never communicated to the High Court and the High

Court's views on these proposals were never asked for. The High Court was not at all consulted in the matter of the Government's proposal to appoint the respondents as District Judges. [624 G-H; 625A]

Secondly, the Government, without any discussion or deliberation with the High Court, refused to accept its recommendation and made the appointment on the basis of seniority. Though seniority is a relevant factor in promoting subordinate judges as District Judges it is not the only criterion. The true test is the suitability of the candidate. If on a consideration of all the relevant factors the High Court comes to a conclusion that the performance of a senior officer was not meritorious enough to entitle him to promotion, it cannot be compelled to recommend such an officer merely on the ground of seniority because the High Court is primarily entrusted with the judicial administration in the State. The High Court has the advantage of judging the suitability of a person, taking into consideration his overall performance in the previous job over a long period of time. [627 B-F]

After declining to hear the petition on grounds of judicial propriety, the High Court granted the certificate with the consent of the parties since the petition involved interpretation of Article 109 of the Constitution of Jammu & Kashmir. It is unfortunate that the State, after having agreed to the course adopted by the High Court, should raise objections as to the validity of the certificate at the stage of appeal in this Court. Undoubtedly the question raised is a substantial question of law of general public importance. Even assuming that the certificate granted by the High Court was not proper this Court could always grant special leave where the question raised deserves to be considered by it. [600 F-H; 601 A-B]

In the instant case while declining to hear the matter the High Court vacated the stay granted earlier, the result of which was an eventual refusal to entertain the writ petition, In the facts and circumstances of this case this is a special case in which this Court can revoke the certificate and grant special leave to the petitioners for filing an appeal, [601 D-E]

Since the question involved in this case is substantially the same, both in the appeal as well as in the petition under Article 32 of the Constitution the question of maintainability of the writ petition becomes purely academic. [601 H]

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[Pathak, J. agreed with the observations of the majority in concurring the incompetence of the certificate granted by the High Court and the maintainability of the writ petition and in the order granting special leave to appeal. On merits his Lordship agreed with the majority that the promotions made by the State Government were contrary to law inasmuch as there was no consultation between the State Government and the High Court before the promotions were made.

[628 G-H; 629 A]

His Lordship, however, did not propose to express any opinion on the appellants' contention that the promotions fall outside the scope of Article 233 of the Constitution. [629 B]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1349 of

1982.

(From the judgment and order dated the 8.3.1982 of the Jammu & Kashmir High Court in W.P. No. 668 of 1981.

AND

Civil Appeal No. 1997 of 1982.

Appeal by special leave from the judgment and order dated the 8th March, 1982 of the Jammu & Kashmir High Court in W.P. No. 668 of 1982.

AND

Writ Petitions Nos. 2186-82 of 1982.

(Under article 32 of the Constitution of India)

K.K. Venugopal S.P. Gupta, R. Satish, E.C. Aggarwala and Krishnamanan, for the appellants in C.A. 1349/82 & for the Petitioners in WP. Nos. 2186-89 of 1982.

P.R. Mridul and Vimal Dave for the Respondents in Civil Appeals.

S.N. Kacker and Altaf Ahmed, for the Respondents in W.Ps.

S.N. Kackar and Altaf Ahmed for the Appellant in C.A. 1997/82.

The following Judgments were delivered

AMARENDRA NATH SEN, J. Four Petitioners belonging to the cadre of Subordinate Judicial Service in the State of Jammu & Kashmir and whose names were recommended by the High Court

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for appointment as District Judges, filed a Writ Petition in the High Court of Jammu & Kashmir (Writ Petition No. 668 of 1982) challenging the validity of appointment as District Judges of the Respondents Nos. 3,4,5 and 6 made by the Governor of the State. In the said Writ Petitions had made the State through the Chief Secretary, Respondent No, 1, the High Court of Jammu & Kashmir through the Registrar, the Respondent No. 2 and the four persons who were appointed District Judges by the Governor, as Respondents 3, 4, 5, and 6. A learned Single Judge of the High Court directed notice to issue to Respondents Nos 1 to 2 in the first Instance to show cause as to why the Petition should not be admitted and the Learned Single Judge further directed that the matter should be listed before a larger Bench for admission. The Learned Single Judge also granted stay of the operation of the order appointing the Respondents Nos. 3 to 6 pending disposal of the admission matter. The matter came up before a Division Bench on 27.2.1982 for admission of the petition and at that time a question was raised as to whether it would be proper for the High Court to hear the Writ Petition since the Court on the administrative side had already taken a decision which forms the basis of the claim of the petitioners in the Writ Petition. On 27.2.1982 after the arguments had been heard at length, the matter was adjourned to 8.3.1982 for further arguments. It appears that on 8.3.1982 when the matter came up for further arguments learned Counsel for the Respondents submitted that in fairness and on the grounds of judicial propriety, the High Court might not hear the Writ Petition. It appears that it was submitted by the learned counsel for the Petitioners that they would have no objection to that course being adopted provided a certificate of fitness to file an appeal in the Supreme Court was granted in their favour. It appears that the learned Counsel for the Respondents did not have any objection to the grant of this prayer of the Petitioners. In view of the agreement between the learned Counsel for the parties, the High Court declined to hear the petition on the ground of judicial propriety and vacated the order for stay passed on 27.11.1981; and the High Court

granted a certificate of fitness to the Petitioners to file an appeal in the Supreme Court, holding that the point involved in the Writ Petition relating to the interpretation of Art. 109 of the Constitution of Jammu & Kashmir, raises a substantial question of law of general public importance and the case was a fit one in which a certificate of fitness should be granted,

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Civil Appeal No. 1349 of 1982 is the Appeal filed by the Appellants on the strength of the certificate granted by the High Court.

Against the Judgment and Order of the High Court dated 8.3.1982 granting certificate of fitness for filing an appeal in this Court after declining to hear the Writ Petition and after vacating the stay, the State obtained Special Leave from this Court to prefer an appeal and Civil Appeal No. 1997 of 1982 has been filed by the State with leave of this Court against this judgment and Order of the High Court dated 8.3.1982.

The Writ Petitioners in the High Court who are also the Appellants in Civil Appeal No. 1349 of 1982 in this Court by certificate granted by the High Court, have filed a Writ Petition in this Court under Art. 32 of the Constitution substantially for the same reliefs claimed in the Writ Petition in the High Court and now forming the subject-matter of Civil Appeal No. 1349 of 1982 in this Court. In the Writ Petition filed in this Court the Petitioners have prayed for the issue of a Writ of Certiorari or in the nature thereof, quashing the order of appointment of respondents nos. 3 to 6 as District Judges, for a Writ, Order or Direction in the nature of quo warranto quashing the appointment of Respondents Nos. 3 to 6 as District Judges and a Writ of Mandamus directing the State to appoint the Petitioners as District and Sessions Judges in accordance with the recommendations made by the High Court of Jammu & Kashmir. The Writ Petition filed by the Petitioners bears writ Petition Nos. 2186 to 2189 of 1982. This judgment will dispose of all the three matters.

As certain preliminary objections have been raised, we consider it proper to deal with the same in the first place.

An objection has been taken with regard to the maintainability of Civil Appeal No. 1349 of 1982 filed in this Court with certificate granted by the High Court. It has been urged that this appeal is incompetent as the certificate granted by the High Court is invalid and improper. The argument is that the High Court in its judgment has not decided any point raised in the Writ Petition and the High Court has declined to deal with the matter on the ground of judicial propriety. It is commented that the only decision of the High Court is the refusal on the part of the High Court to hear the Writ Petition on the ground of judicial pro-

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priety and this decision cannot be the subject matter of a certificate for fitness for filing an appeal in the Supreme Court.

It is on this ground that the State obtained Special Leave from this Court against the judgment of the High Court and Civil Appeal No. 1997 of 1982 has been filed by the State with leave granted by this Court.

It is, no doubt, true that the High Court did not deal with the Writ Petition on its merits as it had been submitted before the High Court on behalf of the Respondents that the High Court should not hear the Writ Petition on the ground of judicial propriety, because the decision taken by

the High Court on the administrative side forms the basis of the claim of the Petitioners in the Writ Petition and the Petitioners were agreeable to the course being adopted by the High Court, provided certificate of fitness to file an appeal in the Supreme Court was granted in their favour. The judgment of the High Court records that the counsel for the Respondents had stated that the respondents had no objection to the grant of the said prayer of the Petitioners and the judgment further records that in view of the agreement between the counsel for the parties, the Court granted certificate of fitness to the Petitioners to file an appeal in the Supreme Court while declining to hear the petition on the ground of judicial propriety.

It is true that the High Court while granting the certificate had not gone into the merits of the writ petition, as the High Court had declined to hear the petition on the ground of judicial propriety. It is, however, to be noted that the High Court had adopted the said course as the said course was agreed upon by the learned counsel for the parties. It may also be noted that the High Court in its judgment has pointed out that the interpretation of Art. 109 of the Constitution of Jammu & Kashmir is involved in the writ petition and the said question is a substantial question of law of general public importance. It appears to us to be rather unfortunate that the State should adopt this attitude and should raise these objections particularly after having agreed before the High Court to the certificate being granted. It appears that in the peculiar facts and circumstances of this case, the High Court which found it embarrassing to deal with the writ petition particularly in view of the objection raised on behalf of the
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State on the ground of judicial propriety, granted certificate with the agreement of the parties and declined to hear the matter. We have no doubt in our mind that the question raised in the writ petition is a substantial question of law of general public importance. If on the ground of any technicality, the certificate granted by the High Court can be said to be not a proper one, this Court can always grant special leave in a proper case which deserves to be considered by this Court. We may further note that the High Court while declining to hear the matter on the ground of judicial propriety had also vacated the stay which had been earlier granted by the High Court. The real effect of the order amounts to a virtual refusal to entertain the writ petition. The certificate granted by a High Court in any case after declining to hear the same on any ground may not be appropriate and may not be held to be valid and may have to be revoked. The present case, however, is a fit case, particularly in view of the peculiar facts and circumstances of this case and the important question of law of general public importance involved, where this Court should grant special leave to the Petitioners. Accordingly, we revoke the certificate granted by the High Court and we grant special leave to the Petitioners for the filing of this appeal. We treat this appeal as one filed with leave granted by this Court.

The other preliminary objection is with regard to the maintainability of the Writ Petition filed by the Petitioners under Art. 32 of the Constitution. It is urged that there is no violation of fundamental rights of the Petitioners and the jurisdiction of this Court under Art. 32 of the Constitution is not, therefore, attracted and the writ petition filed in this Court is not maintainable. It

has, however, been pointed out on behalf of the Petitioners that the violation of Arts. 14 and 16 of the Constitution has been alleged and the Writ Petition under Art. 32 is, therefore, competent. The subject matter of the writ petition is absolutely the same as that of the appeal No. 1349 of 1982 and identical questions are involved in these two proceedings. As we have granted special leave to the Petitioners in Civil Appeal No. 1349 of 1982, the merits of the case have in any event to be decided. The question of maintainability of the writ petition involving the very same questions becomes purely academic, The preliminary objections are accordingly disposed of. We now proceed to deal with the case on its merits.

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The validity of the appointment of respondents 3, 4, 5 and 6 as District Judges is the subject matter of challenge in the writ petition filed in the High Court and also in this Court.

Mr. Venugopal, learned counsel appearing on behalf of the appellants who filed the writ petition in the High Court and who have also filed the writ petition in this Court, have urged two main grounds in support of their contention that the appointment of respondents nos. 3, 4, 5 and 6 are illegal and invalid.

(1) The first ground of attack is that on a proper consideration of Art. 109 and Art. 111 of the Constitution of Jammu and Kashmir, the Governor does not have any power to appoint District Judges from the cadre of Subordinate Judges of the State and this power is vested in the High Court.

(2) The second ground of attack is that even if it be held on a consideration of the aforesaid Articles that the Governor is the authority competent to make the appointment, the appointment must be made by the Governor in consultation with the High Court; and, as in the instant case, the appointments have been made without any consultation with the High Court, the appointments must be held to be in breach of the constitutional provisions and, therefore, illegal and invalid.

Mr. Venugopal has drawn our attention to Art. 109 and Art. 111 of the Constitution of Jammu and Kashmir. The said two Articles read as follows:-

> "109. Appointment of district Judges. (1) Appointment of persons to be, and the posting and promotion of district Judges in the State shall be made by the Governor in consultation with the High Court.
>
> (2) A person not already in the service 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 pleader and is recommended by the High Court for appointment."
>
> "111. Control over subordinate courts-The control over district courts and courts subordinate thereto includ-

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

Mr. Venugopal has rightly pointed out that the aforesaid two Articles of the Constitution of Jammu and Kashmir correspond to Art. 233 and Art. 235 of the Constitution of India. Mr. Venugopal has fairly submitted that though the aforesaid two Articles 109 and 111 of the Constitution of Jammu & Kashmir have not come up for consideration in any particular decision, the corresponding two articles in the Constitution of India have been considered and interpreted in a number of decisions of this Court and the view that has been expressed by this Court on the interpretation of Arts. 233 and 235 of the Constitution of India is contrary to the view he wants us now to accept. Mr. Venugopal has submitted that the view that has been expressed by this Court in the earlier decision should be reconsidered in the interest of judicial administration and for safeguarding the independence of the judiciary. It is his submission that when a judicial officer in the category of subordinate Judges is promoted to the category of District Judges and becomes a District Judge, the Officer concerned is so appointed as District Judge by promotion. Such appointment by promotion, according to Mr. Venugopal, clearly comes within Art. 235 of the Constitution of India which deals with control over subordinate courts and provides:-

> "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
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> 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."

Mr. Venugopal has also drawn our attention to Art. 233 which corresponds to Art. 109 of the Constitution of Jammu & Kashmir. Art. 233 reads as follows:

> "(1) Appointment 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."

Mr. Venugopal argues that Art. 233 is intended to govern the appointment of persons to the District Judges in any State and the posting and promotion of District Judges. It is his argument that Art. 233 does not deal with the case of promotion of subordinate Judges to the post of a District Judge and the promotion of person belonging to the judicial service of the State and holding any post inferior to the post of a District Judge is vested in the High Court by virtue of the provisions contained in Art. 235 of the Constitution of India which corresponds to Art. 111 of the Constitution of Jammu & Kashmir.

It is to be noted that in the case of State of Assam and Anr. v. Kuseswar Saikia and ors.(1) this Court had to deal with a similar situation and consider similar arguments. The State of Assam and the Legal Secretary to the

Govt. of Assam filed an appeal in this Court against the judgment and order of the High Court of Assam, challenging a writ of quo warranto issued by the High Court against Upendra Nath Rajakhowa, District and Sessions Judge, Darrang at Tejpur, declaring that he was not entitled to hold that office.

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The writ was issued by the High Court at the instance of Respondents Nos. 1, 2, 3 in the appeal before the Supreme Court and these Respondents on conviction by Upendra Nath Rajakhowa in a Sessions Trial challenged their conviction inter alia on the ground that Shri Rajakhowa was not entitled to hold the post of District and Sessions Judge, Darrang as his appointment as District Judge was invalid. The High Court held that the appointment of Rajakhowa as District and Sessions Judge was void because the Governor had no power to make the appointment under Article 233 of the Constitution and Shri Rajakhowa could only be promoted by the High Court under Article 235. According to the High Court, this was a case of 'promotion' of a person belonging to the judicial service of the State and the High Court was the authority to make the 'promotion' under Article 235. This view of the High Court was negatived by this Court and this Court allowed the appeal and held at pp. 931-33:

> "Chapter VI of Part VI of the Constitution deals with Subordinate Courts. The history of this Chapter and why judicial services came to be provided for separate from other services has been discussed in The State of West Bengal v. Nripendra Nath Bagchi(1). This service was provided for separately to make the office of a District Judge completely free of executive control. The Chapter contains six articles (233 to 237). We are not concerned with Art. 237 in the present case. Article 235 vests in the High Court the control over District Courts and Courts subordinate thereto, including the posting and promotion and grant of leave to persons belonging to the judicial service of a State and holding any post inferior to the post of District Judge. By reason of the definitions given in Art. 236 the expression 'judicial service' means a service consisting exclusively of persons intended to fill the post of District Judge and other Civil Judicial posts inferior to the District Judge, and the expression 'District Judge' includes among others an additional District Judge and an additional Sessions Judge. The promotion of persons belonging to the judicial service but holding post inferior to a District Judge vests in the High Court. As the

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> expression 'District Judge' includes an Additional District Judge and an Additional Sessions Judge, they rank above those persons whose promotion is vested in the High Court under Art. 235. Therefore, the promotion of persons to be additional District Judge as Additional Sessions Judges is not vested in the High Court. That is the function of the Governor under Art. 233. This follows from the language of the Article itself:
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> (a) 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.

The language seems to have given trouble to the High Court. The High Court holds:

(1) 'appointment to be' a District Judge is to be made by the Governor in consultation with the High Court vide Art. 233; and

(2) 'promotion of' a District Judge and not promotion 'to be a District Judge' is also to be made by the Governor in consultation with the High Court vide Art. 233.

The High Court gives the example of selection grade posts in the Cadre of District Judges which according to it is a case of promotion of a District Judge.

The reading of the article by the High Court is with respect, contrary to the grammar and punctuation of the article. The learned Chief Justice seems to think that the expression 'promotion of' governs 'District Judges' ignoring the comma that follows the word 'of'. The article, if suitably expanded, reads as under:

'Appointments of persons to be, and the posting and promotion of (persons to be), District Judges etc.'

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It means that appointment as well as promotion of persons to be District Judges is a matter for the Governor in consultation with the High Court and the expression 'District Judge' includes an additional District Judge and an additional Sessions Judge. It must be remembered that District Judges may be directly appointed or may be promoted from the subordinate ranks of the judiciary. The article is intended to take care of both. It concerns initial appointment and initial promotion of persons to be either District Judges or any of the categories included in it. Further promotion of District Judges is a matter of control of the High Court. What is said of District Judges here applies equally to additional District Judges and Additional Sessions Judges. Therefore, when the Governor appointed Rajkhowa an Additional District Judge, it could either be an 'appointment' or a promotion under Article 233. If it was an appointment is was clearly a matter under Art. 233. If the notification be treated as 'promotion' of Rajkhowa from the junior service to the senior service it was a 'promotion' of a person to be a District Judge which expression, as shown above, includes an Additional District Judge. In our opinion it was the latter. Thus there is no doubt that the appointment of Rajkhowa as Additional District Judge by the Governor was a promotion and was made under Art. 233, it could not be made under Art. 235 which deals with posts subordinate to a District Judge including an additional District Judge and an additional Sessions Judge. The High Court was in error in holding that the appointment of Rajkhowa to the position of an additional District Judge was invalid because the order was made by the Governor instead of the High Court. The appointment or promotion was perfectly valid and according to the constitution."

In the case of State of West Bengal v. Nripendra Nath Bagchi (1), this Court while considering Arts. 233 and 235 of the Constitution elaborately traced the background and the history of the constitu-

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tional provisions relating to the judiciary and this Court held at page 786:

"Articles 233 to 235 make a mention of two

distinct powers, The first is power of appointments of persons, their postings and promotion and the other is power of control. In the case of the District Judges, appointments of persons to be and posting and promotion are to be made by the Governor but the control over the District Judge is of the High Court."

The view that on proper construction of Article 233 and 235 the appropriate authority to make the appointment of District Judges is the Governor and not the High Court has also been reiterated by this Court in later decision of this Court.

In a recent decision of this Court in the case of Chief Justice of Andhra Pradesh and Ors. v. V.A. Dixitulu and Ors.(1) 5 Judges Bench of this Court held at page 46:

"Article 233 gives the High Court an effective voice in the appointment of District Judges. Clause (1) of the Article peremptorily requires that appointments of persons to be, and the posting and promotion of district judges' shall be made by the Governor in consultation with the High Court. Clause (2) of the Article provides for direct appointment of District Judges from Advocates or pleaders of not less than seven years standing, who are not already in the service of the State or of the Union. In the matter of such direct appointments, also, the Governor can act only on the recommendation of the High Court. Consultation with the High Court under Article 233 is not an empty formality. An appointment made in direct or indirect disobedience of this constitutional mandate, would be invalid. 'Service' which under clause (1) of Article 233 is the first source of recruitment of District Judges by promotion means the 'Judicial services' as defined in Article, 236."

In another recent decision of this Court in the case of Hari Datt Kainthla & Anr. v. State of Himachal Pradesh and Ors.(2)

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this Court referred to earlier decision of this Court and observed at page 372:

"Article 233 confers power on the Governor of the State to appoint persons either by direct recruitment or by promotion from amongst those in the judicial service as District Judges...."

We have to note that on a proper interpretation of Art. 233 and 235 of the Constitution this Court has consistently held that the appointing authority is the Governor and this view has held the field for ever two decades. In our opinion this is the correct view on proper interpretation of the said articles and requires no reconsideration. The argument of Mr. Venugopal that this interpretation will lead to the subservience of the judiciary and the independence of the judiciary will be undermined is not convincing, as the power to make the appointment conferred on the Governor has to be exercised by him in consultation with the High Court. This provision regarding exercise of power by the Governor in consultation with the High Court is incorporated to safeguard the independence of the judiciary. We have earlier pointed out that Art. 109 and Art. 111 of the constitution of Jammu & Kashmir correspond to Art. 233 and 235 of the Constitution of India. In view of the interpretation of Art. 233 and 235 of the Constitution of India consistently given by this Court, and with which we are in entire agreement, we hold that on a proper interpretation of Art. 109 and 111 of the Constitution of Jammu and Kashmir, the Governor is the authority competent to appoint the District Judges and the

power of appointment of District Judges is not vested in the High Court. The first contention of Mr. Venugopal cannot, therefore, be accepted and is negatived.

We now proceed to deal with other contentions of Mr.Venugopal, namely, even if the Governor be held to be the appointing authority the appointment by the Governor must be made in consultation with the High Court and in the instant case, the appointments of the District Judges have not been made in consultation with the High Court and the appointments must, therefore, be held to be invalid and illegal.

It is necessary to state certain facts before we proceed to consider this question. Four vacancies for the posts of District and Sessions Judges in the State became available for being filled up

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out of 12 Judicial Officers who were eligible for selection to the posts in questions. The Judicial Officers eligible for selection in the order of seniority are:

1. Shri Qazi Mohd. Muzaffar-Ud-Din
2. Th. Pavitar Singh
3. Shri Harcharan Singh Bahri
4. Shri Sheikh Maqbool Hussain
5. Shri G.L. Manhas
6. Shri M.M. Gupta
7. Shri H.N. Mehra
8. Shri Jagmohan Gupta
9. Shri Mohd Yasin Kawoosa
10. Shri O.P. Sharma
11. Shri Bashir-Ud-Din
12. Shri Sudesh Kumar Gupta

The High Court at a meeting of all the Judges held on 29.8.1981 considered the matter and the High Court taking into consideration the merit and suitability of all the 12 eligible officers in the cadre of sub-judges, found the following Sub-Judges fit to be promoted as District and Sessions Judges against the available vacancies:

1. Shri M.M. Gupta
2. Shri O.P. Sharma
3. Shri Bashir-Ud-Din
4. Shri Sudesh Kumar Gupta

It is to be noticed that the respective position of the aforesaid officers in the seniority list was 6, 10, 11 and 12. On 31.8.1981 the Registrar of the High Court forwarded to the Government the recommendations of the High Court of the said four Judicial Officers for filling up the said for vacancies. The letter of the Registrar to the Law Secretary to the Government reads as follows:

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"Shri G.H. Nehvi,
Secretary to Govt.,
Law Department,
Jammu & Kashmir Govt.,
Srinagar.
No. 9245/GS dated 31.8.1981
Sub :- Appointments and posting of District & Sessions Judges

Sir,

There are four vacancies available in the cadre of District & Sessions Judges: two of them being available on account of deputation of Shri Ghulam Hassam Nehvi as Law Secretary and the creation of Additional District & Sessions Judge's Court at Ramben and, two others on account of the proposed retirement of M/s. Mohammad Saleem Durrani and Mohammad Shaffi. The matter

regarding replacement was considered in the meeting of the Court held on 28.8.1981. The Court considered the comparative merit, ability and suitability of all the eligible officers in the cadre of Sub-Judges and found the following sub-judges fit to be promoted as District & Sessions Judges against the available vacancies:

(1) Shri M.M. Gupta at present Third Civil Subordinate Judge, (Excise Magistrate), Jammu;
(2) Shri O.P. Sharma, at present Sub Judge (C.J.M.) Jammu.
(3) Shri Bashir-ud-Din, at present, Sub-Judge, Special Judicial Mobile Magistrate, Traffic, Kashmir.
(4) Shri S.K. Gupta, at present, Sub-Judge (Deputy Registrar, Jammu Wing), Jammu.

The four therefore may be promoted as officiating District and Sessions Judges and that their postings may be ordered as under :-

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(1) Shri M.M. Gupta, Second Additional District & Sessions Judge, Srinagar (Single Member Tribunal for Anti-Corruption Cases, Kashmir)
(2) Shri O.P. Sharma, District & Sessions Judge, Rajouri;
(3) Shri Bashir-ud-Din, Second Additional District & Sessions Judge, Jammu (Single Member Tribunal for Anti-Corruption cases, Jammu Province);
(4) Shri S.K. Gupta, 1st Additional District and Sessions Judge, Srinagar (Special Judge Anti Corruption, Kashmir)

I am, therefore, to request you kindly to obtain the sanction of the competent authority and convey the same to me as early as possible,

Yours faithfully

Sd/-
(S.M. Rizvi)
Registrar

31.8.1981

In reply to the said letter of the Registrar, the Law Secretary addressed as follows :-

No. LD (A) 81/143

Sept. 15,1981,

My dear Rizvi,

Please refer to your letter No. 9245/GS dated 31.8.1981, regarding appointment and posting of District & Sessions Judges. I have been directed to request you kindly to send us copy of the resolution of the Hon'ble High Court on the subject and also the Annual Confidential Reports for the last 5 years pertaining to the officers proposed for promotion and also those who are superseded.

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With regards,
Yours
Sd/-
(G.H. Nehvi)
Shri S.M. Rizvi.
Registrar,
High Court of J & K,
Srinagar"

It appears that on 24.9.1981, the Under Secretary to the Government, Law Department, had sent a reminder to the Registrar of the High Court drawing his attention to the earlier letter dated 15.9.1981. On 5.10.81 the High Court sent a detailed letter to the Government justifying the selection made by the High Court setting

out in detail the reasons for supersession of the senior Officers. In this long letter, running into 15 pages (pp. 24-39) in paper book of C.A. No. 1997 of 1982), the High Court made its comments on all the officers who have been superseded. The High Court also forwarded a copy of the resolution dated 29.8.1981. The concluding portion of this long letter reads :-

> "I would, therefore, request you kindly to have the matter expedited and communicate the sanction of the Governor to the proposal already made as early as possible. The ACRs of the Officers concerned for the years 1976-77, 1977-78 and 1978-79 as also the court resolution dated 29.8.1981 are enclosed herewith as desired."

The resolution of the Full Court which was sent along with the letter may be set out:

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LIST OF ITEMS DISCUSSED IN JUDGES MEETING HELD ON 29.8.1981

PRESENT:

The Hon'ble Mufti Baha-Ud-Din Farooqui	Acting Chief Justice
The Hon'ble Justice Dr. A.S. Anand	Judge
The Hon'ble Mr. Justice I.K. Kotwal	Judge
The Hon'ble Mr. Justice G.M. Mir	Judge

Preamble	Resolved
3/-Appointment of Shri Ghulam Hassan Nehvi, Distt. & Sessions Judge, as Law Secretary and crea- of Additional District Court at officers in Ramber filling up of the vacancy in this behalf	3/- After having consi- dered the comperative merit, ability and sui- tability of all the officers in the cadre of Sub-Judges we are of the opinion that the following sub- Judges are fit to be promoted as District & Sessions Judges, against the available vacancies:-

1. Shri M.M. Gupta at present Third Civil Subordinate Judge (Excise Magistrate, Jammu)
2. Shri O.P. Sharma, Sub-Judge, C.J.M. Jammu.
3. Shri Bashir-Ud-Din, Sub-Judge (Special Mobile Magistrate Traffic), Srinagar.
4. Shri Sudesh Kumar Gupta, Sub-Judge (Deputy Registrar, Jammu).

We direct that recommendation shall be made to the Governor accordingly.

We further direct that their place of postings shall be as follows:-

1. Shri M.M. Gupta, Second Addl. Dist. Judge (Single Member Tribunal), Srinagar.

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2. Shri O.P. Sharma, District & Sessions Judge, Rajouri.
3. Shri Bashir-Ud-Din, 2nd Addl. District & Sessions Judge, SM. T. Jammu)
4. Shri S.K. Gupta (Ist Additional District and Sessions Judge) Special Judge, Anti Corruption Srinagar.

The further recommendation shall go to the Governor accordingly.

Sd/- Hon'ble Acting Chief Justice
Sd/- Hon'ble Justice Dr. A.S. Anand
Sd/- Hon'ble Mr. Justice I.K. Kotwal
Sd/- Hon'ble Mr. Justice G.M. Mir

It appears that the meeting was attended by all the Judges of the High Court.

On the 16th November, 1981, the Secretary to the Government, Law Department, addressed the following letter to the Registrar of the High Court:-

No. LD (A) 81/143

Dated: 16.11.1981

The Registrar,
High Court of J & K,
Jammu.

Subject:-Appointment of District and Sessions Judges.

Sir,

The Governor has been pleased to approve the promotion of the following Judicial Officers as District and Sessions Judges:

1. Qazi Mohammad Muzaffar-Ud-Din.
2. Shri Pavitar Singh.

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3. S. Harcharan Singh Bahri.
4. Sheikh Maqbool.

The appointment of Qazi Mohammed Muzaffar-ud-Din will however, be deferred till he is cleared of the charges against him. A post for this purpose will be kept vacant and in case he is exonerated of the charges, his appointment will be given retrospective effect from the date of the issue of the orders regarding other three.

Accordingly, a separate proposal may be sent by the High Court regarding the post of the promoted Officers.

Yours faithfully.

Sd/-
Secretary to Government
Law Department.

It appears that after the recommendations made by the High Court and the detailed reasons by the High Court for recommending the petitioners in supersession of the other officers had been for-warded to the State Government by the High Court, the State Cabinet constituted a sub-Committee which had gone into the matter and had made its recommendations. It appears that on the basis of the recommendations made by the Sub-committee of the State Cabinet the letter of the Law Secretary dated 16th November 1981 to the Registrar of the High Court was addressed, informing the High Court of the Governor's approval to the promotion of Respondents Nos. 3, 4, 5 and 6 as District and Sessions Judges.

On receipt of the aforesaid communication from the Government dated 16.11.1981 the High Court on 24.11.1981, at a meeting of the Judges recorded the following minutes:-

"Copy of extract from the Minutes of Judges meeting held on 24.11.1981

Preamble	Resolved
1. Law Secretary's letter No. LD(A) 81/143 dated 16.11.1981 regarding	1) Considered.The posting of the Offices is proposed as under :-

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appointment of S/Shri Qazi Mohd. Muzaffar-UD-Din, Pavitar Singh, H.S. Bahri and Sheikh Maqbool Hussain as District and Sessions Judge...Submission of proposal regarding their	i) Shri Pavitar Singh -District and Sessions Judge, Leh-Kargil. ii) S.Harcharan Singh Bahri-District & Sessions Judge, Rajouri. iii) Sheikh Maqbool Hussain

posting. 1st Addl. District & Sessions Judge, Srinagar. It shall be pointed out to the Government that the Communication of the posting shall not be deemed as consultation with the Court in terms of Section 109 of the Constitution of Jammu and Kashmir in so far as the promotion of these officers is concerned.

Thereafter, on 26.11.1981, the following order was passed by the State Government:-

"Government of Jammu and Kashmir Civil Secretariat: Law Department

Sub:-Officiating appointment of District & Sessions Judges.

ORDER NO. 717-LD (A) of 1981 dated 26.11.1981

Sanction is accorded to the officiating appointing of the following sub-Judges as District and Sessions Judges in the scale of Rs. 1100-1600 against available vacancies with the posting as shown against each in consultation with the Hon'ble High Court:-

(1) Shri Pavitar Singh - District and Sessions Judge, Leh-Kargil

(2) Shri Harchran Singh - District and Sessions Judge, Rajouri

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(3) Sheikh Maqbool Hussain - Ist Additional District and Sessions Judge, Srinagar, Special Judge, Anti Corruption, Kashmir, Srinagar.

By order of the Governor

Sd/- G.H. Nehvi
Secretary to Government
Law Department.

Mr. Venugopal, learned counsel for the Petitioners has argued that the High Court after due consideration of the respective merits and suitability of all the officers, recommended the names of the petitioners for appointment as District Judges and thereafter at the request of the Government, the High Court had on 5.10.1981 forwarded to the Government detailed reasons and the High Court had also forwarded the confidential reports of the officers which were in the possession of the High Court. Mr. Venugopal points out that without any further reference to the High Court, the State Government on the basis of the report of a Cabinet Sub-Committee, chose not only ignore the recommendations made by the High Court but also to appoint respondents nos. 3 to 6 without any kind of consultation with the High Court about the appointment of the said respondents. Mr. Venugopal has argued that the State Government should as a rule accept the recommendations made by the High Court. He contends that in any event the State Govt. cannot appoint any officer as District and Sessions Judge without consultation with the High Court as consultation with the High Court is the mandatory requirement of Art. 109 of the Constitution of Jammu and Kashmir which empowers the Governor to make the appointments in consultation with the High Court. It is the contention of Mr. Venugopal that this requirement of consultation with the High Court constitutes a salutary safeguard for preserving

the independence of the judiciary. The consultation envisaged must be full and effective and the point of view of the High Court in the matter of appointment has to be discussed, understood and properly appreciated and generally accepted. Mr. Venugopal has argued that the responsibility of judicial administration in the State basically rests on the High Court and the High Court for properly discharging its functions, must necessarily have proper judicial officers competent to discharge the duties to be entrusted to them. It is the argument of Mr. Venugopal that the High Court which has complete control over its judicial officers
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has all relevant records of the officers and is in a proper position to understand and appreciate their performance and merits, must necessarily be the best Judge as to the suitability for promotion of these officers as District Judges.

In this connection Mr. Venugopal has referred to a number of decisions of this Court. Mr. Venugopal has submitted that in the instant case, in the matter of appointment of the Respondents Nos. 3, 4, 5 and 6 there has not been any kind of consultation with the High Court and the said respondents have been appointed without any reference to the High Court and even without a formal intimation to the High Court that the recommendations made by the High Court were not acceptable and the State Governments was going to appoint Respondents Nos. 3 to 6 herein. It is the submission of Mr. Venugopal that these appointments must therefore, be held to be violative of the Constitution and must, therefore, be held to be invalid and illegal and should be quashed.

Mr. Kacker, learned counsel appearing on behalf of the State, has submitted that it is open to the State Government not to accept the recommendations of the High Court and the Governor may refuse to accept the recommendations made by the High Court with out assigning any reason whatsoever. Mr. Kackar argues that the requirement of the Constitution is that the appointment of District Judges by the Governor of the State must be made by him in consultation with the High Court. It is his argument that the consultation does not mean either concurrence or recommendation and no particular form or procedure is also necessary to be followed in the matter of this consultation. He submits that in the instant case, the State Government had asked for all the relevant materials which were in the possession of the High Court and the High Court had forwarded to the State Government the annual confidential reports and other materials and also the comments of the High Court with regard to each and every candidate on the eligible list. Mr. Kacker contends that consideration by the State Government of all these materials placed by the High Court results in and amounts to consultation within the meaning of the Article. Mr. Kacker submits that on a consideration of all the materials issued by the High Court, the State Government decided not to accept the recommendations made by the High Court and decided to appoint Respondent Nos. 3, 4, 5 and 6 as District Judges. It is the submission of Mr.
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Kacker that there has been consultation within the meaning of the Article and there has been sufficient compliance with the Constitutional requirement as to consultation.

In the case of Chandra Mohan v. State of Uttar Pradesh,(1) this Court while considering Art. 233 of the Constitution observed after setting out Art. 233 (1) at pp. 82-83 :-

"We are assuming for the purpose of these appeals that the 'Governor' under Art. 233 shall act on the advice of the Ministers. So the expression 'Governor' used in the Judgment means Governor acting on the advice of the Ministers. The Constitutional mandate is clear. The exercise of the power of appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of District Judge in consultation with the High Court. The object of consultation is apparent. The High Court is expected to know better than the Governor in regard to the suitability or otherwise of a person, belonging either to the 'Judicial service' or to the Bar, to be appointed as district judge. Therefore, a duty is enjoined on the Governor to make the appointment in consultation with a body which is the appropriate authority to give advice to him. This mandate can be disobeyed by the Governor in two ways, namely, (i) by not consulting the High Court at all, and (ii) by consulting the High Court and also other persons. In one case he directly infringes the mandate of the Constitution and in the other he indirectly does so far his mind may be influenced by other persons not entitled to advise him. That this constitutional mandate has both a negative and positive significance is made clear by the other provisions of the Constitution. Wherever the Constitution intended to provide more than one consultant, it has said so: See Arts. 124 (2) and 217 (1) Wherever the Constitution provided for consultation of a single body or individual it said so: See Art. 222, Art. 124 (2) goes further and makes a distinction between persons who shall be consulted and persons who may be consulted. These provisions indicate that the duty to consult is so integrated with the exercise of the power that the power can be exercised only in consultation with the person or persons designated therein. To state it

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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".

In the case of Chandramouleshwar Prasad v. Patna High Court & Ors.,(1) a 5 Judge Bench of this Court held at p. 674-675:

"consultation with the High Court under Art. 233 is not an empty formality. So far as promotion of Officers to the cadre of District Judge is concerned the High Court is best fitted to adjudge the claims and merits of persons to be considered for promotion. The Governor cannot discharge the function under Art. 233 if he makes an appointment of a persons without ascertaining the High Court's views in regard thereto It was strenuously contended on behalf of the State of Bihar that the materials before the Court amply demonstrate that there had been consultation with the High Court before the issue of the notification of October 17, 1968. It was said that the High Court had given the Government its views in the matter; the Government was posted with all the facts and there was consultation sufficient for the purpose of Art. 233. We cannot accept this. Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to other or others and discuss and examine the relative merits of their views. If one party makes a proposal to the other

who has a counter proposal in his mind which is not communicated to the proposer the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation. In our opinion, the notification of October 17, 1968 was not in compliance with Art. 233 of the Constitution. In the absence of consultation the validity of the notification of 17th October, 1968 cannot be sustained.

In the case of High Court of Punjab and Haryana etc.v. State of Haryana,(2) the view expressed by this Court in Chanderamouleshwar
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prasad's case (supra) noted by another Constitution Bench of 5 Judges at p. 377:

"In Chandramouleshwar Prasad v. Patna High Court & Ors. [1970] 2 SCR 666 it was said that under Art. 233 the appointment of person to be District Judge rests with the Governor but he must make the appointment in consultation with the High Court. The Governor should make up his mind after there has been deliberation with the High Court. The consultation is not complete or effective before the parties thereto make there respective points of view known to the other or others. It was said that the Governor cannot discharge his functions under Article 233 if he makes the appointment of a person without ascertaining the points of view of the High Court with regard thereto."

In the case of Chief Justice of Andhra Pradesh and Ors. v. V.A. Dixitulu and Ors. (supra), the same view has been reiterated in the following observation at p. 46:-

"Article 233 gives the High Court an effective voice in the appointment of District Judges. Clause (1) of the Article peremptorily requires that 'appointments of persons to be, and the posting and promotion of, district Judges" shall be made by the Governor 'in consultation with the High Court. "Clause (2) of the Article provides for direct appointment of District Judges from advocates or pleaders of not less than seven years standing, who are not already in the service of the State or of the Union. In the matter of such direct appointments, also, the Governor can act only on the recommendation of the High Court. Consultation with the High Court under Art. 233 is not an empty formality. An appointment made in direct or indirect disobedience off his constitutional mandate, would be invalid (See Chandra Mohan v. State of U.P.(1) and Chandramouleshwar v. Patna High Court(2) 'Service' which under clause (1) of Article 233 is the first source of recruitment of District Judges by promotion, means the 'judicial services' as defined in Article 236."
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In a recent decision of this Court in Hari Datt Kainthla & Anr. v. State of Himachal Pradesh & Ors. (supra) this Court reaffirmed the views earlier expressed at p. 372-373:

"Article 233 confers power on the Governor of the State to appoint persons either by direct recruitment or by promotion from amongst those in the judicial service as District Judges but this power is hedged in with the condition that it can be exercised by the Governor in consultation with the High Court. In order to make this consultation meaningful and purposive the Governor has to consult High Court in respect of

appointment of each person as Distt. Judge which includes an Additional Distt Judge and the opinion expressed by the High Court must be given full weight. Art. 235 invests control over subordinate courts including the officers manning subordinate courts as well as the ministerial staff attached to such courts in the High Court. Therefore, when promotion is to be given to the post of District Judge from amongst those belonging to subordinate judicial service, the High Court unquestionably will be competent to decide whether person is fit for promotion and consistent with its decision to recommend or not to recommend such person. The Governor who would be acting on the advice of the Minister would hardly be in a position to have intimate knowledge about the quality and qualification of such person for promotion. Similarly when a person is to be directly recruited as District Judge from the Bar the reasons for attaching full weight to the opinion of the High Court for its recommendation in case of subordinate judicial service would mutatis mutandis apply because the performance of a member of the Bar is better known to the High Court that the Minister or the Governor. In Candra Mohan v. State of Uttar Pradesh and Ors. (supra) at page 83, a Constitution Bench of the Court observed as under:

"The Constitutional mandate is clear. The exercise of the power of appointment by the Governor is condi-
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tioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of District Judge in consultation with the High Court. The object of consultation is apparent. The High Court is expected to know better than the Governor in regard to the suitability or otherwise of a person, belonging either to the "judicial service" or to the Bar, to be appointed as a district judge. Therefore, a duty is enjoined on the Governor to make the appointment in consultation with a body which is the appropriate authority to give advice to him."

This view was reaffirmed in Chandramouleshwar Prasad v. Patna High Court & Ors. (supra) observing:-

"The High Court is the body which is intimately familiar with the efficiency and quality of officers who are fit to be promoted as District Judges. The High Court alone knows their merits as also demerits."

The facts which we have earlier set out establish that after the High Court had forwarded its recommendations and thereafter sent the detailed comments alongwith a copy of the resolution as requested by the Government. The State Government without any further intimation to the High Court or without any kind of discussion with the High Court had made the appointment of respondents Nos. 3, 4, 5 and 6, ignoring the recommendations made by the High Court. The facts further go to indicate that on receipt of the detailed comments and the resolution a cabinet sub-committee had considered the matter and on the recommendations made by the Cabinet sub-committee, the Governor did not act on the recommendations made by the High Court but made the appointments on the recommendations of the sub committee. The recommendations of the sub-committee were never communicated to the High Court and the State Government had not discussed or sought the views of the High Court on the findings and recommendations of the cabinet sub-committee. It is, therefore, abundantly clear from the facts of the present case that the counter-proposals sought to be made by

the Government in the matter of appointment were never communicated to the High Court and the High Court's views on the said proposals of the Government were never asked for and the
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High Court was not at all consulted in the matter of Government's proposals to appoint respondents Nos. 3, 4, 5 and 6 as District Judges. It is well settled that 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 minds which is not communicated to the proposer, the direction to give effect to the counter proposal without anything more, cannot be said to have been done after consultation. We are, therefore, of the opinion that in the instant case there has not only been no effective or complete consultation but, in fact, there has been complete lack of consultation in the matter of appointment of Respondents Nos. 3, 4, 5 and 6. We must, therefore, hold that the appointment of the Respondents Nos. 3, 4, 5 and 6 in the absence of consultation with the High Court must be held to be violative of the constitutional requirement and therefore, invalid. The impugned order appointing respondents Nos. 3, 4, 5 and 6 has, therefore, necessarily to be quashed.

Before concluding we consider it necessary to emphasize that independence of the judiciary is one of the basic tenets and a fundamental requirement of our Constitution. Various Articles in our Constitution contain the relevant provisions for safeguarding the independence of the Judiciary. Art 50 of the Constitution which lays down that "the State shall take steps to separate the judiciary from the executive in the public services of the State", postulates separation of the judiciary from the executive.

Unfortunately, for some time past there appears to be an unhappy trend of interference in the matter of judicial appointments by the executive both at the State and the Central level. The unfortunate interference by the executive results in prolonged and unnecessary delay in making the appointments and judicial vacancies continue for months and in cases for years with the result that the cause of justice suffers. It is common knowledge that members of the Bar who are considered suitable to be on the Bench are reluctant to join the Bench and the Office of a Judge has for various reasons ceased to attract the tenanted members of the Bar. The further unfortunate fact is that even in cases when competent
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members of the Bar may be persuaded to accept the office of a High Court Judge or join the higher judicial service, they ultimately withdraw their consent in view of the delay in making the appointments and because of various restrictions sought to be imposed. As in the present case we are not really concerned with the appointment of a Judge of the High Court or of a direct appointment to the higher judicial service from the Bar, we do not purpose to dilate on this subject. Article 235 of the Constitution vests the control of judicial administration completely in the High Court excepting in the matter of initial appointment and posting of district judges and the dismissal, removal or termination of services of these officers. Even in these matters the requirement of the Constitution is that the Governor must act in consultation with the High Court. If in the matter of

appointment, the High Court is sought to be ignored and the executive authority chooses to make the appointment, independence of the judiciary will be affected. Persons who are interested in being appointed District Judges, whether directly or by promotion, will try to lobby with the executive and curry favour with the Government for getting these appointments and there is every possibility of the independence of such persons so appointed being undermined with the consequence that the cause of justice will suffer. We are of the opinion that healthy convention and proper norms should be evolved in the matter of these appointments for safeguarding the independence of the judiciary in conformity with the requirements of the constitution. We are of the opinion that normally, as a matter of rule, the recommendations made by the High Court for the appointment of a District Judge should be accepted by the State Government and the Governor should act on the same. If in any particular case, the State Government for good and weighty reason find it difficult to accept the recommendations of the High Court, the State Government should communicate its views to the High Court and the State Government must have complete and effective consultation with the High Court in the matter. There can be no doubt that if the High Court is convinced that there are good reasons for the objections on the part of the State Government, the High Court will undoubtedly reconsider the matter and the recommendations made by the High Court. Efficient and proper judicial administration being the main object of these appointments, there should be no difficulty in arriving at a consensus as both the High Court and the State Government must necessarily approach the
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question in a detached manner for achieving the true objective of getting proper District Judges for due administration of justice.

It appears that in the instant case, the State Government without any kind of intimation to the High Court or any discussion or deliberation with the High Court refused to accept the recommendations made by the High Court and proceeded to make the appointments only on the basis of seniority without any kind of consultation with the High Court. Seniority, undoubtedly, is a relevant factor in considering promotion. It is, however, to be borne in mind that in the matter of promoting the Subordinate Judge to a District Judge, seniority is not the only criterion, though it is a material factor to be considered. The true test in the matter of promotion is the suitability of the candidate. In considering the suitability, no doubt, the seniority plays a very important role. A senior Subordinate Judge may by virtue of the longer period of his service and wider experience be normally considered to be more suitable than any junior Officer. The greater length of service also gives the High Court an opportunity of judging his performance and merit for a longer period. If, howsoever, on a proper consideration of the performance and merit of the officer for this longer period, the High Court comes to the conclusion that the performance of the officer concerned though for a period longer than any officer junior to him is not satisfactory and meritorious enough, to entitle him to be promoted, the High Court cannot be compelled to recommend such an officer only on the ground of his seniority for promotion. It has to be borne in mind that in such a case the High Court has the further advantage of judging the suitability of the officer, taking into consideration his performance over a longer period of time. The High Court by

virtue of its control over the officers must be considered to be the best judge of the ability and suitability of any officer as the High Court has in its possession all relevant materials regarding the performance of the officer. The High Court of the State is primarily entrusted with the judicial administration in the State; and for efficient and due discharge of its responsibility, the High Court needs to have proper officers in proper places. The High Court must be recognised to be the best judge of the requirements for proper and efficient administration of justice and it should generally be left to the High Court to decide as to which of
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the officers will best serve the requirements in furtherance of the cause of justice. High Court's main concern is efficient judicial administration in the State for properly serving the cause of justice. While making any recommendation, no other extraneous matter weighs with the High Court. The High Court judges the suitability for promotion in a detached manner taking into consideration all material facts and relevant factors for promoting the cause of justice and efficient judicial administration in the State. It may be a problem for the High Court to properly post a person as a District Judge whom the High Court considers not be suitable for the post and to entrust him with the responsibility of a District Judge.

The appointment of Respondent Nos. 3, 4, 5 and 6 made by the State Government in violation of the constitutional provisions are, therefore, set aside. The said vacancies are directed to be filled up in accordance with law. We, however, wish to make it clear that quashing the appointments of Respondents Nos. 3, 4, 5 and 6 will not render any orders passed and judgments delivered by them during the period they have continued to function as District Judge on the basis of the invalid appointments made, illegal, invalid and void. To prevent any kind of confusion in the matter of administration of justice and in the larger interest of justice order passed and judgments delivered by the Respondents Nos. 3, 4, 5 and 6 have to be held valid and binding, as if their appointments so long as the same have not been set aside, were valid for the purposes of dealing the matters disposed of by them. The appeal filed by the appellants and the writ petition filed by them in the High Court of Jammu and Kashmir are accordingly allowed to the extent indicated above with costs against the State Government. In view of this order no order is necessary on the writ petition filed in this Court.

PATHAK, J. I entirely agree with my learned brother Sen in his observations concerning the incompetence of the certificate granted by the High Court and the maintainability of the writ petition and in the order granting special leave to appeal to the appellants.

On the merits I agree with my learned brother that the promotions of respondents Nos. 3, 4, 5 and 6 as District and Sessions
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Judges by the State Government is contrary to law inasmuch as there was no consultation between the State Government and the High Court before the promotions were effected. This contention of the appellants must succeed. I do not propose to express any opinion on the other contention of the appellants that the promotions fall outside the scope of Article 233 of the Constitution.

P.B.R. Appeal allowed.
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