validly constituted and whether the income of the 300 shares could be treated as the income of S. Raghbir Singh individually. The other finding as to who should be treated to be the recipient of the income of these 300 shares was merely an incidental finding not necessary at all for the decision of the reference. I am, therefore, in agreement with Mahajan, J., that this finding was merely incidental and not a finding necessary for the decision of the case and, therefore, this would not be a finding within the meaning of the proviso in pursuance of which any action could be taken.

(43) In view of the above, I find that both the tests which are necessary for bringing the case within the second proviso fail in this case, and, agreeing with Mahajan, J., I hold that the Tribunal was correct in its decision that the proceedings initiated and the assessment made were barred by time. The question, therefore, referred to this Court is answered in the affirmative and against the Department. I also agree with Mahajan, J., that there should be no order as to costs.

K.S.K.

FULL BENCH

Before D. K. Mahajan, H. R. Sodhi and Bal Raj Tuli, JJ.

INDER PARKASH ANAND,—*Petitioner*

versus

THE STATE OF HARYANA AND OTHERS,—*Respondents.*

Civil Writ No. 3604 of 1971

November 18, 1971.

Constitution of India (1950)—*Articles* 234, 235 *and* 309—*Punjab Civil Services Rules, Volume I, Part I—Rule* 3.26 *and Volume II, Rule* 5.32(c)—*Punjab Civil Services (Judicial Branch) Rules* (1951)—*Appendix 'B' item* (b)—*Government Servant—Superannuation age of—Whether* 58 *and not* 55 *years—Pre-mature retirement of a Government servant by an invalid notice—Whether can be challenged by a writ petition in the High Court under Article* 226 *of the Constitution—Persons appointed to the judicial service of the State—Whether become subject to the control of the High Court in all matters—State Government—Whether has the authority to order premature retirement of a judicial officer on its own initiative.*

Held, (by majority—Mahajan and Tuli, JJ., Sodhi, J., Contra) that the age of superannuation is the age at which, under the Service Rules, a

Judicial Officer or any other Government servant is required to retire from service without any order being passed by any authority. If any rule provides for the retirement of a Government servant earlier than his attaining the age of superannuation, that will be called pre-mature retirement or earlier retirement. Under Rule 3.26 of Punjab Civil Services Rules, Volume I, Part I, the age of superannuation of a Government servant, other than a Class IV employee, is 58 years and the absolute right of Government to retire a government servant on three months' notice after he has attained the age of 55 years under rule 5.32(c) of Punjab Civil Services Rules, Volume II or item (b) of Appendix 'B' of Punjab Civil Services (Judicial Branch) Rules (1951) is a restriction on the normal right of the government servant to continue in service till he attains the age of 58 years. If the notice is valid, the government servant has to retire and cannot claim a right to continue in service till he attains the age of 58 years but if the notice issued to him is invalid for any reason, he has the right to continue in service upto the age of 58 years. He can file a writ petition in the High Court to claim that right and pray for the quashing of the invalid notice.

(Paras 7 and 9)

Held, (by majority—Mahajan and Tuli, JJ., Sodhi, J., Contra.) that after a person is appointed to the Judicial Service of a State, the State Government becomes *functus officio* and the entire control—administrative, judicial and disciplinary—vests in the High Court. As long as that officer remains in service, all orders *qua* him in respect of his service have either to be passed by the High Court or by the State Government only on the recommendation of the High Court in respect of the matters over which the State Government has been given the jurisdiction under the provisions of the Constitution or the conditions of service governing the Judicial Service. The State Government on its own initiative cannot pass any order. Premature retirement as envisaged in rule 5.32(c) of Punjab Civil Services Rules, Volume II and in item (b) in Appendix 'B' to the Punjab Civil Services (Judicial Branch) Rules, 1951, is neither dismissal nor removal nor is such an order passed by way of punishment. It is, therefore, not within the jurisdiction of the State Government to decide whether to retire a Judicial Officer from service before he attains the age of 58 years. That decision must be made by the High Court and effect to that decision has to be given by the Government by passing an order in accordance with the Constitution. Such an order falls within the category of both administrative and disciplinary control. A Judicial Officer will not be retained in service after he attains the age of 55 years only if the High Court finds him unfit to continue in service for any reason. The Government cannot be made the judge of his fitness to continue in service after attaining that age and before attaining the age of 58 years which is the age of superannuation. If such a power is given to the State Government, it will impinge on the soleness of the control vested in the High Court. The Government will then be at liberty to pick and choose, according to the pulls working with it, as to whom to retain in service and whom not to retain after attainment of the age of 55 years so that the members of the Judicial Service will have to look to the State Government for continuance in service after the age of 55 years and not to the High Court. It will mean that on attaining the age of 55 years,

the State Government assumes control over the Judicial Officers instead of the High Court. If such a situation is countenanced, the independence of the judiciary will be greatly impaired and the object of the Constitution makers in making the High Court the *sole custodian* of the control over the subordinate judiciary will be completely frustrated.

(Para 10)

Held. (per Sodhi, J., Contra.), that by raising the age of superannuation to 58 years, the appointing authority, which in the case of judicial officers too is indisputably the State Government, retained an absolute right to retire any such official on or after he had attained the age of 55 years without assigning any reason. A corresponding right is made available to such government servant to retire on or after attaining the age of 55 years. The only pre-requisite for retiring an officer at the age of 55 years is that three months' notice on either side is necessary before the officer voluntarily chooses to retire or is asked by the Government to retire. Whatever right is conferred on the government servant by amendment of rule 3.26 of Punjab Civil Services Rules, Volume I, Part I to continue in service uninterruptedly subject to good conduct upto the age of 58 years is simultaneously whittled down by introducing an amendment in rule 5.32 of the Punjab Civil Services Rules, Volume II, making it optional both for the State Government and the government servant to terminate the service by serving three months' notice with a further rider that the appointing authority has an absolute right to terminate services of a government servant without assigning any reason so that the matter is not left in any doubt. These rules cannot be read in isolation and if they are read together, the only irresistible and reasonable conclusion is that by virtue of amendment of the statutory rules the terms and conditions of service of a government servant get changed as and when he attains the age of 55 years. Whatever legal right a government servant has to continue in service upto the age of superannuation, viz., 58 years, because of his status as a government servant in view of the statutory rules regulating the terms and conditions of his service, is not available to him in absoluteness and on reaching the age of 55 years the only right that he retains is three months' notice before his services are terminated.

(Para 31)

Held (per Sodhi, J., Contra.) that a perusal of the scheme of Judicial Service Rules leaves no room for doubt that the High Court, which was consulted when the said rules regulating the recruitment were framed, as envisaged in Article 234 and proviso to Article 309 of the Constitution, accepted that the power of termination could be exercised by the Government without a recommendation to that effect by the High Court. The case of termination of services has indeed been placed in a separate category and the State Government alone is given authority to exercise power in this regard. Terms and conditions of government servants, including judicial officers, are regulated by rules framed by the Governor under proviso to Article 309 of the Constitution. Rules for subordinate judicial service in respect of appointments only are to be framed under Article 234 of the Constitution, after consultation with the State Public Service Commission and the High Court. Conditions of service cover a vast field included pension,

leave, allowance, etc., and rules with regard to them are not covered by Article 234. The matter of compulsory or pre-mature retirement is one relating to the terms and conditions of service and howsoever wide may be the amplitude of control given to the High Court under Article 235 over Judicial Officers, it can be exercised only in accordance with their terms and conditions of service. The control vests in the High Court so long as a Judicial Officer remains in service and not that the question of his continuance in service at the age of 55 years or thereafter which is a matter primarily between the employer (the State Government) and its employees, becomes a matter of control within the meaning of Article 235 of the Constitution. When the age of 55 years is reached in government service, terms and conditions stand varied automatically by virtue of the statutory rules and a new condition is introduced that the service is terminable on three months' notice on either side. There is, therefore, no breach of Article 235 of the Constitution involved when the State Government terminates the services of a judicial officer on three months' notice on or after his attainment of the age of 55 years as permitted by rules relating to conditions of service. It is not correct to assume that the State Government will exercise its power to keep judiciary under its thumb and use the same as sword of Damocles hanging over judicial officers so that they have to look to the executive for continuance in service after the age of 55 years. Such an approach cannot be defended in law. (Para 37)

Case referred by the Division Bench consisting of Hon'ble Mr. Justice D. K. Mahajan and Hon'ble Mr. Justice H. R. Sodhi on 20th October, 1971 to a larger Bench for deciding an important question of law. The Full Bench consisting of Hon'ble Mr. Justice D. K. Mahajan, Hon'ble Justice H. R. Sodhi and Hon'ble Mr. Justice Bal Raj Tuli, finally decided the case on 18th November, 1971.

Petition under Articles 226/227 of the Constitution of India praying that a writ of certiorari, *or any other appropriate writ, order or direction be issued quashing the notice of retirement dated 20th August, 1971, by respondent No. 1.*

Petitioner in Person.

J. N. Kaushal, Advocate-General, Haryana with Ashok Bhan Advocate for Respondent No. 1 & 3.

H. L. Sibal, Advocate-General, Punjab, with S. S. Kang, Deputy Advocate-General, Punjab, and S. C. Sibal, & J. M. Sethi, Advocates, for Respondent No. 2.

JUDGMENT

B. R. Tuli, J.—The petitioner joined service as member of the Punjab Civil Service (Executive Branch) from amongst the lawyers in November, 1954. He was selected for the Judicial Branch of the Punjab Civil Service (now Haryana Civil Service) on or about May 1, 1965. He was promoted from the time-scale to the Selection Grade of the Haryana Civil Service (Judicial Branch) with effect from November 15, 1968, was promoted as officiating Additional District and

Sessions Judge with effect from April 1, 1970, and was posted at Hissar. He was due to attain the age of 55 years on February 24, 1971, and his case was considered by the High Court whether to recommend his retirement at the age of 55 or to retain him in service till the age of 58 years, which is the age of superannuation prescribed under rule 3.26 of the Punjab Civil Services Rules, Volume I, Part I. The High Court was of the opinion that the work of the petitioner as Additional District and Sessions Judge was not quite satisfactory, especially on the civil side. The Haryana Government was, therefore, informed by letter dated January 22, 1971, that the case of the petitioner for continuance in service beyond the age of 55 years was considered and on account of his unsatisfactory work as Additional District and Sessions Judge, the Honourable Chief Justice and the Judges were not inclined to recommend his continuance in Superior Judicial Service up to the age of 58 years. The High Court, however, recommended that he may be reverted to his substantive post in the Haryana Civil Service (Judicial Branch) as Senior Subordinate Judge/Chief Judicial Magistrate and should be allowed to continue in service upto the age of 58 years. In that letter, the High Court also pointed out that the work of the petitioner as a member of the Haryana Civil Service (Judicial Branch) had been considered to be above average and his integrity was beyond dispute. The State Government agreed to the recommendation of the High Court for reverting the petitioner from the post of Additional District and Sessions Judge to that of Senior Subordinate Judge/Chief Judicial Magistrate but with regard to his retention in service up to the age of 58 years, the High Court was asked to consider whether, in view of the petitioner's work as Additional District and Sessions Judge, Hissar, having been found to be unsatisfactory, he should be retained at all in the service beyond the age of 55 years. To this letter, the High Court sent a reply on April 6, 1971, stating—

> "The work of the petitioner as Senior Subordinate Judge/Chief Judicial Magistrate will be reviewed after he has worked for six months as such and if he is found wanting, it will be recommended to the State Government to retire him after giving the requisite notice."

The Government was requested to communicate the orders for the continuance of the petitioner in service up to the age of 58 years. On receipt of this letter from the High Court, the State Government

considered the matter again and referred the case back to the High Court drawing its attention to the concluding portion of para (iv) of Punjab Government letter No. 4776-3GS(1)-64/15823, dated 19/21st May, 1964, reading as under :—

> "There may be difficulties when a Government employee has been officiating in a higher grade for a long time and it appears unlikely that he would put his heart into his work after reversion. This, however, is a question for which no hard and fast rules can be laid down and each case will have to be considered on its own merits."

The State Government, therefore, expressed its view that after the petitioner's reversion from the post of Additional District and Sessions Judge to the post of Senior Subordinate Judge/Chief Judicial Magistrate, he was not likely to work whole-heartedly and, therefore, it would be in the public interest to retire him after giving him three month's notice. The High Court did not agree with this suggestion of the State Government and *vide* letter dated August 16, 1971, reiterated its earlier view that the petitioner may be retained in service up to the age of 58 years. The State Government, however, did not agree with the said recommendation of the High Court and decided to retire the petitioner under rule 5.32(c) of the Punjab Civil Services Rules, Volume II, after giving him three month's notice. That notice was issued to the petitioner on August 20, 1971, reading as under :—

"From

The Chief Secretary to Government, Haryana.

To

Shri I. P. Anand, HCS (Judicial Branch),
Senior Sub-Judge, Rohtak.

Dated Chandigarh, the 20th August, 1971.

Subject : Three month's notice of retirement from service of Shri I. P. Anand.

Sir,

I am directed to say that the Governor of Haryana, in consultation with the Punjab and Haryana High Court, has decided that you shall be retired from service in accordance

with the provisions of note appended to rule 5.32(c) of the Punjab Civil Services Rules, Volume II, as applicable to the State of Haryana.

2. You are, therefore, hereby given notice that on the expiry of three months from the date of the receipt of this communication, you shall retire from service under the Haryana Government."

A copy of this notice was sent to the High Court for information and necessary action and another copy was sent to the Accountant General, Haryana, Chandigarh. On receipt of this notice, the petitioner filed the present petition challenging the validity of the notice served on him.

(2) The main point of law raised in the petition is that under Article 235 of the Constitution of India, the control over the subordinate judiciary vests solely in the High Court and the order for pre-mature retirement of the petitioner before attaining the age of superannuation that is, 58 years, could be passed only by the High Court and not by the State Government. Since the High Court found him fit to continue in service up to the age of 58 years as Senior Subordinate Judge/Chief Judicial Magistrate, the State Government had no power under rule 5.32(c) of the Punjab Civil Services Rules, Volume II, to issue three months' notice for retiring the petitioner before attaining that age. The petitioner has also alleged *mala fides* of the Government and Shri Bansi Lal, Chief Minister, Haryana, which will be dealt with towards the end of this judgment.

(3) The respondents to the writ petition are the State of Haryana (respondent 1), the High Court for the States of Punjab and Haryana at Chandigarh (respondent 2) and Shri Bansi Lal, Chief Minister, Haryana (respondent 3).

(4) Written statements have been filed by respondent 1 and respondent 3 denying the assertions made by the petitioner as to the competency of the State Government to issue the impugned notice and the *mala fides* alleged against the Chief Minister. No replication has been filed by the petitioner.

(5) The petition came up for hearing before the Division Bench consisting of my learned brethren Mahajan and Sodhi, JJ., on

October 20, 1971, and in view of the importance of the questions involved, the learned Judges directed the case to be heard by a Full Bench. That is how this writ petition has been placed before this Bench for disposal.

(6) The petitioner has argued the case himself but he was not able to afford much assistance. Shri Hira Lal Sibal, Advocate General for the State of Punjab, has argued the case on behalf of the High Court and Shri J. N. Kaushal, Advocate General, Haryana, on behalf of the State of Haryana. Both the learned counsel have rendered us great assistance and have ably argued the case from all aspects.

(7) The first point for determination is whether the age of superannuation for a Judicial Officer is the attainment of 58 years or 55 years. In my view, the age of superannuation is the age at which, under the Service Rules, a Judicial Officer or any other Government servant is required to retire from service without any order being passed by any authority. If any rule provides for the retirement of a Government servant earlier than his attaining the age of superannuation, that will be called pre-mature retirement or earlier retirement. Rule 3.26 of the Punjab Civil Services Rules, Volume I, Part I, prescribes the age of superannuation for a Government servant including a Judicial Officer as 58 years but before he attains the age of 58 years, he can be required to retire after attaining the age of 55 years on giving him three months' notice under rule 5.32(c) of the Punjab Civil Services Rules, Volume II. The age of superannuation is, therefore, 58 years and not 55 years. This matter was considered by their Lordships of the Supreme Court in *The State of Mysore* v. *Padmanabhacharya etc* (1), in which case rule 294(a) of the Mysore Service Regulations prescribed the age of superannuation as 55 years to which note 4 was added in these terms :—

> "The age of retirement of trained teachers in the Education Department may generally be fifty-eight years, and in the case of teachers who are not trained but who are otherwise efficient the age of retirement may also be fifty-eight years.
>
> The Director of Public Instruction in Mysore is empowered to order the retirement of teachers, trained and untrained in

(1) (1966) 1 S.C.R. 994.

the non-gazetted cadre who have not got a good record of service and who are not up to the mark, at the age of fifty-five years, and in the case of gazetted servants, with the concurrence of Government in each case.

The above provision shall be deemed to have come into force with effect from the 20th August, 1954."

It was the effect of this addition to rule 294(a) that fell for a consideration before the Supreme Court with regard to which their Lordships observed :—

"So far as trained teachers are concerned, there is no doubt that note 4 carved out an exception to rule 294(a) which provides that the normal age of retirement is 55 years and it is for the Government to decide whether to grant extensions to persons after they completed 55 years and this grant of extension was on the basis of such persons remaining efficient in the opinion of Government after the age of 55 years. But note 4 made a change in that position so far as trained teachers were concerned. That change was that in the case of trained teachers the normal age of retirement was to be 58 years. The latter part of the note, however, gave power to the Director of Public Instruction to retire even trained teachers in the non-gazetted cadre provided they had not a good record of service and were not up to the mark. In such a case the Director had the power to retire them at the age of 55 years if he was of the view that they had not a good record of service and were not up to the mark. Thus under rule 294(a) as it was before April 29, 1955, the normal age of retirement was 55 years for all including trained teachers and it was for the Government to give extension on the ground of fitness. But after note 4 was added to rule 294(a), the position with respect to trained teachers was changed and trained teachers were normally entitled to continue in service till the age of 58 years unless the Director or the Government, as the case may be, was of the opinion that they had not a good record of service and were not up to the mark. Therefore, after the change made on April 29, 1955, trained teachers could only be

retired at the age of 55 years if the Director of Public Instruction or the Government, as the case may be, came to the conclusion that they had not a good record of service and were not up to the mark. Therefore, before the respondents in the present appeals could be retired at the age of 55 years, the Director of Public Instruction or the Government, as the case may be, had to come to the conclusion that they had not a good record of service and were not up to the mark. If such a conclusion was not arrived at, they would be entitled under note 4 to continue in service up to the age of 58 years. It is not disputed on behalf of the appellant that no such decision, namely, that the respondents had not a good record of service and were not up to the mark, was taken.

Stress is laid on the word 'generally' appearing in the first part of note 4. The presence of that word does not mean that the normal age of retirement is still 55 years. The reason why the word 'generally' is used in the earlier part of note 4 is to be found in the latter part of the same note where power has been given to the Director of Public Instruction to retire trained teachers at the age of 55 years if they have not a good record of service and are not up to the mark. Because of that power it was necessary to use the word 'generally' in the earlier part of the note, as otherwise there would be an indefeasible right in trained teachers to continue in service up to the age of 58 years, even if they did not have a good record of service and were not up to the mark.

In the circumstances, the respondents would be entitled to continue in service up to the age of 58 years and could not be retired at the age of 55 years in view of the exception carved out by note 4 in the general provision contained in rule 294(a). The contention of the appellant in this connection must, therefore, be rejected."

On the parity of reasoning, it can be held that the normal age of superannuation of the petitioner is 58 years and that he is entitled to continue in sevice up to that age unless a valid order for his premature retirement is passed by the competent authority under rule 5.32(c) or item (b) in Appendix 'B' to the Punjab Civil Services (Judicial Branch) Rules, 1951.

(8) Rule 3.26 and rule 5.32 *ibid* came up for consideration before a Full Bench of this Court in *Pritam Singh Brar* v. *The State of Punjab and others* (2), in which also it was held that—

> "the petitioner was entitled to remain in service till the age of 58 years but the real question would be whether the two rules, namely, 3.26 and 5.32 stand apart and cannot be read or given effect to together."

(9) Another Full Bench of this Court in *Punjab State* v. *Mohan Singh Mahli* (3), observed on the concession of the learned counsel that—

> "on attaining the age of 55 years, a Government servant could be retired without assigning any reason whatsoever. That means that he has a right to continue in service up to 55 and not 58 years and thereafter, he can be made to retire after complying with rule 5.32(c)."

This observation does not in any way indicate that the age of superannuation is reduced to 55 years. The age of superannuation remains as 58 years but a Government servant can be retired before attaining that age and after attaining the age of 55 years under rule 5.32(c). This is clear from another observation of the learned Judges to the effect :—

> "There is, however, no doubt, that before a Government servant could be retired on his attaining the age of 55 years, compliance with the provisions of rule 5.32(c) had to be made and a valid notice given thereunder. It is also true that whether rule 5.32 (c) is mandatory or directory, it has to be complied with."

In view of these judgments, I hold that under rule 3.26 *ibid,* the age of superannuation of a Government servant, other than a Class IV employee, is 58 years and the absolute right of Government to retire a Government servant on three months' notice after he has attained the age of 55 years under rule 5.32(c) *ibid* is a restriction on the normal right of the Government servant to continue in service till

(2) I.L.R. (1967) 2 Pb. & Hr. 448=1967 S.L.R. (Pb.) 688.

(3) I.L.R. (1970) 1 Pb. & Hr. 701=1970 S.L.R. 194.

he attains the age of 58 years. If the notice is valid, the Government servant has to retire and cannot claim a right to continue in service till he attains the age of 58 years but if the notice issued to him is invalid for any reason, he has the right to continue in service up to the age of 58 years. He can file a writ petition in this Court to claim that right and pray for the quashing of the invalid notice. Shri J. N. Kaushal is, therefore, not right in his submission that after attaining the age of 55 years the Government servants have no right to continue in service and cannot claim that right by filing a writ petition in which the notice issued under rule 5.32(c) *abid* is challenged. Consequently, I hold that the present petition filed by the petitioner challenging the notice issued to him by the State of Haryana under rule 5.32(c) *ibid* and claiming that he is entitled to continue in service till the attainment of the normal age of superannuation, that is, 58 years, or till the High Court makes an order for his pre-mature retirement, is maintainable.

(10) The next question that arises for consideration is whether the impugned notice issued by the State of Haryana is valid or not. For this purpose, it is necessary to refer to Articles 233, 234 and 235 of the Constitution of India which read as under :—

> "233(1). Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.
>
> (2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.
>
> 234. Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.
>
> 235. The control over district courts and courts subordinate thereto including the posting and promotion of, and the

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

The petitioner was a member of the Judicial Service of the State to which Article 235 applies. According to that Article, the appointing authority of the petitioner was the Governor of the State which expression has been held to mean the "State Government" by a Division Bench of this Court in *State of Punjab* v. *Shamsher Singh and another* (4). In that case it was held that the Government is the appointing and dismissing authority of a member of the Punjab Civil Service (Judicial Branch). The appointment has to be made by the State Government in accordance with the rules framed under that Article. After a person is appointed to the Judicial Service of the State, he becomes subject to the control of the High Court in all matters, that is, administrative, judicial and pertaining to discipline except that if an order of dismissal or removal has to be passed *qua* him, the competent authority to pass that order is the State Government. It was so held by their Lordships of the Supreme Court in *The State of West Bengal and another* v. *Nripendra Nath Bagchi* (5). In that case, Bagchi had joined service as a Munsif on November 10, 1927. After promotion he became an Additional District and Sessions Judge and officiated at several stations as District and Sessions Judge but was never confirmed as such. In the ordinary course he was due to superannuate and retire on July 31, 1953, but by an order dated July 14, 1953, the Government of West Bengal ordered that he should be retained in service for a period of two months commencing from August 1, 1953. Bagchi was retained in service for the purpose of holding a departmental enquiry against him. He was placed under suspension by an order dated July 20, 1953, by the State Government. A charge-sheet was served on him by the State Government and the enquiry was held by an I.C.S. Officer appointed by the State Government. The Enquiry Officer

(4) 1970 Cur. L.J. 610.

(5) A.I.R. 1966 S.C. 447=(1966) 1 S.C.R. 771.

submitted his report to the State Government as a result of which Bagchi was dismissed from service on May 27, 1954. His retention in service was extended from time to time up to that date. His appeal to the Governor failed and he applied to the High Court at Calcutta under Articles 226 and 227 of the Constitution against the order of his dismissal. It was pleaded that the State Government had no jurisdiction to hold the enquiry and to dismiss him as a result thereof. That jurisdiction vested in the High Court. The High Court accepted that contention and quashed the order of his dismissal. The State of West Bengal appealed to the Supreme Court. Their Lordships traced the history of the separation of the judiciary from the executive and the meaning of the word 'control' used in Article 235 of the Constitution and observed :—

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

necessarily indicates an order passed in disciplinary jurisdiction. Secondly, the words are that the High Court shall 'deal' with the Judge in accordance with his rules of service and the word 'deal' also points to disciplinary and not mere administrative jurisdiction.

Articles 233 and 235 make a mention of two distinct powers. The first is power of apointments 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. We are not impressed by the argument that the term used is 'district court' because the rest of the article clearly indicates that the word 'court' is used compendiously to denote not only the court proper but also the presiding Judge. The latter part of Article 235 talks of the man who holds the office. In the case of the judicial service subordinate to the District Judge the appointment has to be made by the Governor in accordance with the rules to be framed after consultation with the State Public Service Commission and the High Court but the power of posting, promotion and grant of leave and the control of the courts are vested in the High Court. What is vested includes disciplinary jurisdiction. Control is useless if it is not accompanied by disciplinary powers. It is not to be expected that the High Court would run to the Government or the Governor in every case of indiscipline however small and which may not even require the punishment of dismissal or removal. These articles go to show that by vesting 'control' in the High Court the independence of the subordinate judiciary was in view. This was partly achieved in the Government of India Act, 1935, but it was given effect to fully by the drafters of the present Constitution. This construction is also in accord with the Directive Principles in Article 50 of the Constitution which reads :

'50. The State shall take steps to separate the judiciary from the executive in the public services of the State'. "

The learned counsel for the State of West Bengal referred to Articles 309 to 311 of the Constitution and urged that the dismissal and removal of a Government servant under Article 311 vested in the appointing authority and, therefore, such orders *qua* the members of the Judicial Service could be made only by the State Government which meant that the disciplinary control of the High Court was not complete. The learned counsel also argued that this power of the Government determined that the enquiry must be made by or under the directions of the Governor or the Government. To lend support to his contention, he referred to provisos (b) and (c) to clause (2) of Article 311 but their Lordships repelled the argument with the following observation :—

"That the Governor appoints District Judges and the Governor alone can dismiss or remove them goes without saying. That does not impinge upon the control of the High Court. It only means that the High Court cannot appoint or dismiss or remove District Judges. In the same way the High Court cannot use the special jurisdiction conferred by the two provisos. The High Court cannot decide that it is not reasonably practicable to give a District Judge an opportunity of showing cause or that in the interest of the security of the State it is not expedient to give such an opportunity. This the Governor alone can decide. That certain powers are to be exercised by the Governor and not by the High Court does not necessarily take away other powers from the High Courts. The provisos can be given their full effect without giving rise to other implications. It is obvious that if a case arose for the exercise of the special powers under the two provisos, the High Court must leave the matter to the Governor. In this connection we may incidentally add that we have no doubt that in exercising these special powers in relation to inquiries against District Judges, the Governor will always have regard to the opinion of the High Court in the matter. This will be so whoever be the inquiring authority in the State. But this does not lead to the further conclusion that the High Court must not hold the enquiry any more than that the Governor should personally hold the enquiry.

There is , therefore, nothing in Article 311 which compels the conclusion that the High Court is ousted of the jurisdiction

to hold the enquiry if Article 235 vested such a power in it. In our judgment, the control which is vested in the High Court is a complete control subject only to the power of the Governor in the matter of appointment (including dismissal and removal) and posting and promotion of District Judges. Within the exercise of the control vested in the High Court, the High Court can hold enquiries, impose punishments other than dismissal or removal, subject however to the conditions of service, to a right of appeal if granted by the conditions of service, and to the giving of an opportunity of showing cause as required by clause (2) of Article 311 unless such opportunity is dispensed with by the Governor acting under the provisos (b) and (c) to that clause. The High Court alone could have held the enquiry in this case. To hold otherwise will be to reverse the policy which has moved determinedly in this direction."

In this judgment, their Lordships clearly laid down that the control which is vested in the High Court is a complete control subject only to the power of the Governor in the matter of appointment (including dismissal and removal) and posting and promotion of District Judges. Premature retirement as envisaged in rule 5.32(c) *ibid*, is neither dismissal nor removal nor is such an order passed by way of punishment. It is, therefore, not within the jurisdiction of the State Government to decide whether to retire a Judicial Officer from service before he attains the age of 58 years. That decision must be made by the High Court and effect to that decision has to be given by the Government by passing an order in accordance with the Constitution. Such an order falls within the category of both administrative and disciplinary control. A Judicial Officer will not be retained in service after he attains the age of 55 years only if the High Court finds him unfit to continue in service for any reason. The Government cannot be made the judge of his fitness to continue in service after attaining that age and before attaining the age of 58 years which is the age of superannuation. If such a power is given to the State Government, it will impinge on the soleness of the control vested in the High Court, which has been repeatedly emphasised by their Lordships of the Supreme Court in *Bagchi's case*, (5) (*supra*). The Government will then be at liberty to pick and choose, according to the pulls working with it, as to whom to retain in service and whom not to retain after attainment of the age of 55

years so that the members of the Judicial Service will have to look to the State Government for continuance in service after the age of 55 years and not to the High Court. In other words, it will mean that on attaining the age of 55 years, the State Government assumes control over the Judicial Officers instead of the High Court. If such a situation is countenanced, the independence of the judiciary will be greatly impaired and the object of the Constitution makers in making the High Court the *sole custodian* of the control over the subordinate judiciary will be completely frustrated. It will also not be out of place to emphasise here that their Lordships in *Bagchi's case,* (5) (*supra*) laid down that while exercising the special powers under provisos (b) and (c) to clause (2) of Article 311, in relation to inquiries against District Judge, the Governor will always have regard to the opinion of the High Court in the matter, although nothing has been said about it in Article 311(2), under which exclusive jurisdiction is vested in the Governor. On the parity of reasoning, it can be said that while passing an order of pre-mature retirement against a member of the Judicial Service of the State, the State Government shall always have regard to the opinion of the High Court in the matter and that no such order will be passed by the State Government unless a recommendation to that effect is made by the High Court.

(11) The learned Advocate General for the State of Haryana, in reply, submits that the Constitution makers did not vest an absolute control over the judiciary in the High Court but put fetters on it by enacting that nothing in that Article is to be construed as taking away from any person belonging to the Judicial Service 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 service prescribed under such law. The learned counsel argues that a member of the Judicial Service is to be governed by the conditions of his service and the period for which he is to remain in the service is one of the conditions of his service. His tenure is thus prescribed by the Government—the employer—and the same authority can curtail that period. It is, therefore, maintained that under rule 5.32(c) *ibid* the State Government has been rightly given the absolute right to retire any Government servant after he attains the age of 55 years and before he attains the age of 58 years after giving him three months' notice and this is the condition of service subject to which a Judicial Officer serves

the State. If the rule vests absolute power in the State Government, it cannot be said that the exercise of that power is subject to the control of the High Court because those words are not to be found in that rule. In my opinion, there is no merit in this submission. If any condition of service impinges on the complete control of the High Court over the subordinate judiciary, that rule will have to be struck down as unconstitutional on the ground that it contravenes Article 235 of the Constitution. A similar construction of Article 235, as has been put before us by Mr. Kaushal, was commended by the learned counsel for the State of West Bengal to their Lordships of the Supreme Court in *Bagchi's case*, (5), but was not accepted, as is clear from the following observation on page 785 of the report :—

> "Lastly, it is contended that conditions of service are outside 'control' envisaged by Article 235 because the conditions of service are to be determined by the Governor in the case of the District Judge and in the case of judges subordinate to the District Judge by the Rules made by the Governor in that behalf after consultation with the State Public Service Commission and with the High Court. We do not accept this construction".

According to the Service Rules, the appointment as a Subordinate Judge is made by the State Government on the recommendation of the High Court. The procedure followed is that on the request of the High Court, the State Government asks the State Public Service Commission to hold a competitive examination. As a result of that examination, the State Government selects the candidates for appointment. The names of those candidates are communicated to the High Court where they are entered in a register. Whenever a vacancy or vacancies occur, whether permanent, temporary or officiating, the High Court makes a selection from the High Court register in the order in which the names have been entered therein and forwards those names to the Government for appointment as Subordinate Judges under Article 234 of the Constitution of India. Every Subordinate Judge is, in the first instance, appointed on probation for two years which period can be extended to three years. During the period of probation, the Government of the State, on the recommendation of the High Court, is authorised to dispense with the services of a Subordinate Judge without assigning any cause

or to confirm a Subordinate Judge in his appointment on the recommendation of the High Court. It follows that the appointment of a Subordinate Judge out of the selected candidates is made by the State Government on the recommendation of the High Court and he can be confirmed after his successful completion of the period of probation by the State Government on the recommendation of the High Court or his services can be dispensed with during the period of his probation, if so recommended by the High Court. Every action by the State Government, therefore, is taken on a recommendation of the High Court and not on its own initiative. The disciplinary jurisdiction, as held by their Lordships of the Supreme Court in *Bagchi's case* (5) solely and completely vests in the High Court which can pass any order of punishment, short of removal or dismissal from service. These two orders can be passed only by the appointing authority, that is, the State Government, but the enquiry into the misconduct or charges leading to the order of removal or dismissal has to be held by the High Court. It is only when the High Court forwards the case to the State Government with a recommendation to pass the order of removal or dismissal from service that the State Government assumes the jurisdiction to pass that order. Unless the High Court makes such a recommendation, the State Government cannot pass an order of dismissal or removal from service merely because an enquiry has been held and the State Government is of the opinion that an order of dismissal or removal from service is called for. I have emphasised this fact to show that any order in respect of a member of the Judicial Service can be passed by the State Government in accordance with the conditions of service only on the recommendation of the High Court and not on its own initiative. Even before rule 5.32(c) was framed, a rule existed in the Punjab Civil Service (Judicial Branch) Rules in Part F as under :—

> "In matters relating to discipline, penalties and appeals including orders specified in Appendix B, members of the Service shall be governed by 'The Punjab Civil Service (Punishment and Appeals) Rules, 1952' as amended from time to time, provided that the nature of penalties which may be inflicted, the authority empowered to impose such penalties or pass such orders and the appellate authority shall be as specified in Appendix 'A' and 'B' below."

Appendix "B" deals with other orders and only two such orders are mentioned therein for which the authority competent to pass

an order is the Government against which no appellate authority is provided. The nature of these orders is described as—

(a) reducing the maximum pension under the rules;

(b) terminating the appointment of a member of the service otherwise than upon his reaching the age fixed for superannuation.

It is apparent that an order reducing maximum pension under the rules will be made only on the recommendation of the High Court with regard to the nature of the work of a member of the Judicial Service as the State Government had no control over him during his service. Similarly, an order terminating the appointment of a member of the Service otherwise than upon his reaching the age fixed for superannuation will be passed by the State Government on the recommendation of the High Court which has throughout seen and watched the work of the officer. The power under rule 5.32(c) is analogous to the power given to the State Government in Appendix "B" with regard to such orders and, therefore, it is legitimate to infer that the State Government cannot exercise that power on its own initiative but has only to do so on the recommendation of the High Court.

(12) Shri J. N. Kaushal formulated the following propositions for our consideration in the course of his arguments :—

(1) Control of the High Court over the subordinate judiciary envisaged by Article 235 is subject to the rules framed under Articles 234 and 309 of the Constitution.

(2) In the matter of imposing punishments, the proceedings have to be initiated by the High Court but in the instant case, since no question of imposition of a punishment is involved, the proceedings need not initiate at the level of the High Court. The proceedings were not required to be initiated by the High Court.

(3) The present case is concerned with the tenure of service of a Judicial Officer which is a matter relating to his conditions of service in which respect the petitioner is bound by rules 3.26 and 5.32 *ibid.*

(4) Disciplinary jurisdiction of the High Court presupposes that the officer is continuing in service but the age up to which he is to continue in service is not a matter of discipline.

(5) The advise or a recommendation of the High Court for the purpose of allowing a member of the Judicial Officer (service) to continue in service till the age of 58 years is not binding on the Government.

(6) On attaining the age of 55 years, a Government servant as well as a member of the Judicial Service has no right to continue in service till he attains the age of 58 years as both sides get a right to terminate the service at their sweet pleasure. It is a misnomer to say that he is entitled to continue till 58 years.

(7) It is for the employer to determine whether an employee should continue in service till the age of 58 years or not and the employer in this case being the Government, it has the exclusive right to terminate the services of the petitioner before he attains the age of 58 years but after he attains the age of 55 years. The High Court has no say in the matter as it is only a department of the Government like other departments.

I have already dealt with these matters generally but to recapitulate, it is sufficient to say that the normal age of superannuation of a member of the Judicial Service being 58 years under rule 3.26, its curtailment, for whatever reason, is a matter of control which vests solely in the High Court to the exclusion of the State Government. The fixation of the age of superannuation is certainly the right of the State Government but the curtailment of that period under another rule governing the conditions of service is a matter pertaining to disciplinary control as well as administrative control. Disciplinary control does not mean only the jurisdiction to award punishment for a misconduct. It also embraces the power to determine whether the record of a member of the Service is satisfactory or not so as to entitle him to continue in service for the full term till he attains the age of superannuation or to prematurely terminate his service in accordance with the Service Rules. Pre-mature retirement, no doubt, does not amount to a

punishment nor can it be considered as a dismissal or removal from service but it has to be determined on the basis of the service record and a conscious decision has to be made whether he deserves to complete the full tenure of his service or not. The pre-mature retirement is ordered to chop off the dead wood when it is felt that a member of the Service, who has attained the age of 55 years is not efficient enough to continue further in service. Such a decision is, therefore, made in the exercise of both administrative and disciplinary jurisdiction. It is administrative because it is decided in public interest to retire him pre-maturely and it is disciplinary because a decision is taken that he does not deserve, for whatever reason, to continue in service up to the normal age of superannuation and that it is in the public interest to drop him out earlier. In these circumstances, it cannot be said that when all kinds of control, administrative, judicial and disciplinary, vest solely in the High Court, that Court cannot have any say in the matter of pre-mature retirement of a member of the Judicial Service. The High Court cannot be equated with a department of the State Government so as to plead that its opinion or recommendation is not binding on the State Government in the matter of pre-mature retirement of a member of the Judicial Service of the State.

(13) In *State of Assam* v. *Ranga Mahammad and Others,* (6) their Lordships of the Supreme Court held that the matter of transfer of a District Judge was within the jurisdiction of the High Court because of its control over the Judicial Service. It was observed :—

> "It follows, therefore, that under Article 233, the Governor is only concerned with the appointment, promotion and posting to the cadre of district Judges but not with the transfer of district Judges already appointed or promoted and posted to the cadre. The latter is obviously a matter of control of district Judges which is vested in the High Court.....................
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> This is, of course, as it should be. The High Court is in the day to day control of courts and knows the capacity for work of individuals and the requirements of a particular station or Court. The High Court is better suited to make transfers than a Minister. For however well-meaning a

(6) A.I.R. 1967 S.C. 903=(1967) 1 S.C.R. 454.

> Minister may be, he can never possess the same intimate knowledge of the working of the judiciary as a whole and of individual Judges, as the High Court. He must depend on his department for information. The Chief Justice and his colleagues know these matters and deal with them personally. There is less chance of being influenced by secretaries who may withhold some vital information if they are interested themselves. It is also well-known that all stations are not similar in climate and education, medical and other facilities. Some are good stations and some are not so good. There is less chance of success for a person seeking advantage for himself if the Chief Justice and his colleagues, with personal information, deal with the matter, than when a Minister deals with it on notes and information supplied by a secretary. The reason of the rule and the sense of the matter combine to suggest the narrow meaning accepted by us. The policy displayed by the Constitution has been in this direction as has been explained in earlier cases of this Court. The High Court was thus right in its conclusion that the powers of the Governor cease after he has appointed or promoted a person to be a district Judge and asigned him to a post in cadre. Thereafter, transfer of incumbents is a matter within the control of District Courts including the control of persons presiding there as explained in the cited case."

These observations apply with full force to a case where premature retirement is to be ordered. Such a power can only be exercised by the High Court and not by the State Government. The State Government has only to pass an order to that effect on the recommendation of the High Court. In other words, the decision is to be of the High Court which has to be carried out or given effect to by the State Government. Such a recommendation of the High Court should be considered as binding on the State Government as the High Court and not the State Government is the head of the State judiciary and it is the jurisdiction of the High Court to control the conduct and the working of the Courts and their presiding officers subordinate to it. This result automatically follows from the provisions of Article 235 of the Constitution vesting complete control over the subordinate judiciary in the High Court. It will not be out of place to repeat here what I said in

Shri Ishwar Chander Aggarwal v. *The State of Punjab*, (7), on the respective powers of the High Court and the State Government or the Governor. The appeal under clause X of the Letters Patent against that judgment was dismissed *in limine* but an appeal by special leave is pending in the Supreme Court. That decision related to a probationer. After referring to the observations of their Lordships of the Supreme Court in *Bagchi's case* (5) (*supra*), which have been set out above in an earlier part of the judgment, I said :—

> "From these observations, it is quite clear that the Governor has the power to appoint the members of the judicial service including the District Judges which also includes the power to dismiss or remove from service, but for every other disciplinary action, the power vests in the High Court. It is the High Court and High Court alone, which can judge whether the work and conduct of a particular member of the judicial service have been satisfactory during the period of his probation and whether he is a fit person to be retained in service. If the decision of the High Court is against the judicial officer, the Governor or the State Government has not been given the power to differ therefrom or to overrule it. Giving such a power to the Governor merely because the power of appointment, dismissal or removal from service vests in him, will detract from the complete control of the High Court over the subordinate judiciary and will thus impair the independence of the judiciary which has been sought to be attained by separating the judiciary from the executive. The Governor has only to issue the order terminating the services of a probationer on the recommendation of the High Court. He cannot sit in appeal over the recommendation or decision of the High Court in this matter. The Governor may communicate his views to the High Court in case he feels any doubt but if, after considering his views, the High Court reiterates its previous recommendation the Governor should feel bound by that recommendation and issue orders in accordance therewith. This conclusion is inevitable in view of the dictum of their Lordships that the High Court is made the *sole custodian* of the control over the judiciary

(7) C.W. 86 of 1970 decided on 17th Sept., 1970.

which evidently means that no other authority can be allowed to share or interfere therein. The termination of services of a probationer on the ground of his unsuitability for the service does not amount to dismissal or removal from service and is not within the power of the Governor. In such a case, the Governor has only to issue the order in terms of the recommendation of the High Court in the proper form to comply with the constitutional requirement and not to determine whether the recommendation of the High Court is justified or not on the material considered by it.

This matter can be looked at in another way. Supposing the Hon'ble Chief Justice and Judges of the High Court are of the opinion that the conduct and work of a particular probationer during his probationary period were not satisfactory and, therefore, he is not a fit person to be retained further in service and when the papers go to the Governor for issuing the order, in terms of the constitutional provision, dispensing with his services, he refuses to pass an order or passes an order of confirmation. There will then be two courses open to the High Court, viz., either to accept the verdict of the Governor or to stick to its own recommendation. If it accepts the verdict of the Governor, no further question will arise but if it sticks to its own recommendation, it can refuse to post that officer anywhere. The Governor has no power to post him and unless he is posted as a judicial officer at a particular place and is invested with the necessary powers, he will not be able to do any judicial work. The result will be a dead lock or stalemate as there is no provision authorising the Governor to compel the High Court to post that person as a judicial officer, nor is there any provision to resolve that deadlock or stalemate unless it is accepted, as has been held by their Lordships of the Supreme Court in *Bagchi's case* (5) (*supra*), that in the matter of control the decisive voice is with the High Court and not with the Governor. It is, therefore, inherent in the power of control of the High Court that in the matter of probation, its opinion, recommendation or decision should be accepted, by the Governor without demur. This conclusion irresistably follows from the provisions of Article 235 of the Constitution, as interpreted

by their Lordships in *Bagchi's case* (5), but even if it be not very clear, it is essential to establish such a convention between the Governor and the High Court in matters relating to the judiciary. I feel fortified in this opinion of mine, in view of the fact that the State Government has three wings, the Executive, the Legislature and the Judiciary, and the Governor is the Head of the State *qua* all the three wings. In matters relating to the Executive Government, he cannot override the decisions of the Council of Ministers, and in the matter of the Legislature, he cannot go against the will of the Legislature. If the Legislature passes a Bill, it has to be presented to the Governor for his assent. He is permitted to refuse his assent once and to send back the Bill to the Legislature for reconsideration with his message and if the Legislature persists in passing that Bill again, the Governor has no power to refuse his assent thereafter. A provision to this effect is made in Article 200 of the Constitution. Similarly, with regard to the judiciary, where consultation with the High Court is provided or where the Governor has to act on the recommendation of the High Court, he cannot assume the power of overruling the decision of the High Court he must honour the decision of the High Court and act in accordance therewith in order to avoid stalemate or a deadlock. He, of course, has the right to give his opinion in the matter to the High Court but if, after considering his opinion, the High Court is still of the opinion that a particular judicial officer is not fit to be retained in service, the Governor should not insist on imposing his will on the High Court to keep him in service. He must act only as a constitutional head in the case of the judiciary as he does in respect of the other two wings of the Government as the real head of the State judiciary is the High Court. This interpretation of Article 235 of the Constitution and the respective powers of the Governor and the High Court will lead to smooth administration of justice and there will be no chance of a deadlock or stalemate occurring. If such an overriding power cannot be given to the Governor, it certainly cannot be given to the State Government. Whatever has been said above with regard to the Governor applies with full force to the State Government."

(14) If the recommendation of the High Court is not held to be binding on the State Government, startling results will follow. If it is held that the recommendation of the High Court for allowing a member of the Judicial Service to run his full tenure of service up to the age of superannuation, that is, 58 years, is not binding on the Government, it will follow that a recommendation of the High Court to retire a member of the Judicial Service after attaining the age of 55 years and before attaining the age of 58 years will also not be binding. The result will be that the State will be deprived of the services of an efficient member of the Judicial Service for a number of years in one case while in the other case an undesirable member of the Judicial Service shall be thrust on the State by the Government in spite of the advice or recommendation of the High Court to the contrary. In none of these cases it can be said that it will be in the public interest not to accept the recommendation of the High Court. The vesting of the complete control over the subordinate judiciary in the High Court by the Constitution makers clearly leads to the conclusion that the decision of the High Court on matters within its jurisdiction shall be binding on the State Government and that the State Government shall faithfully carry them out.

(15) Shri J. N. Kaushal greatly emphasised that under Article 235 of the Constitution, the High Court cannot deal with a member of the Judicial Service otherwise than in accordance with the conditions of his service prescribed under any law regulating the conditions of his service and for this reason, the High Court cannot interfere in the power of the State Government to prematurely retire the petitioner from the Judicial Service under rule 5.32(c) which is a condition of his service. This argument, with respect to the learned counsel, is unintelligible to me. In the present case, the High Court is not dealing with the petitioner otherwise than in accordance with the conditions of his service. The condition of petitioner's service with regard to the age of superannuation is that he shall continue in service up to the age of 58 years and the High Court has recommended to the State Government that he should be allowed to continue in service up to that age. It is not the High Court but the State Government which has passed an order curtailing the age of his superannuation. In my opinion, under rule 5.32(c) *ibid*, the State Government cannot act in a manner which impinges on the power of control of the High Court under Article 235 of the Constitution. The power under

rule 5.32(c) can only be exercised by the State Government on the recommendation of the High Court and not on its own initiative. It may be pertinent to observe that in *Bagchi's case* (5) it was pleaded on behalf of the State of West Bengal that the departmental enquiry was conducted by the Government in accordance with the Service Rules and the punishment was also imposed in accordance therewith. This plea would have been sustained in respect of any other Government servant but was not accepted in the case of a member of the Judicial Service because of the provisions of Article 235 of the Constitution vesting the complete control over the subordinate judiciary in the High Court. It was with reference to Article 235 that it was held that the enquiry held by the State Government was illegal and without jurisdiction because it was not held by the High Court which alone was the competent authority to hold the enquiry. On the parity of reasoning, the argument advanced by Shri J. N. Kaushal that the impugned order retiring the petitioner from service has been passed in accordance with rule 5.32(c) *ibid* and the High Court has no say in the matter has to be repelled as being without substance.

(16) The learned Advocate-General for the State of Haryana has placed great reliance on the Full Bench judgment of the Kerala High Court in *N. Srinivasan, Additional District and Sessions Judge, Quilon and another* v. *State of Kerala,* (8), in support of his argument but I am of the opinion that that case does not help him. The facts in that case were that the age of superannuation fixed by the Service Rules was originally 55 years which was increased to 58 years and was thereafter again reduced to 55 years. Two of the three learned Judges held that the right to fix the age of superannuation vested in the Government and it did not require any consultation with the High Court whether at the time when it was increased or at the time when it was reduced while the third learned Judge held that consultation with the High Court was necessary if a change was to be made in the already prescribed age of superannuation in so far as the members of the Judicial Service were concerned. It is no doubt true that the fixation of the age of superannuation is within the province of the employer, that is, the State Government which has also the power to increase or reduce it. In that case, whatever the age of superannuation is prescribed will apply to all members of the Service but to retire

(8) A.I.R. 1968 Kerala 158.

before attaining that age for any reason under the rules falls within the province of the High Court in respect of the members of the Judicial Service and not the State Government, as has already been held above. I wish to emphasise that in respect of the members of the Judicial Service only the High Court can be entrusted with the power to curtail the age of superannuation in a particular case because of the intimate knowledge of their work and conduct which have been observed throughout the period of their service by the High Court. To give this power to the State Government will detract from the soleness of the control vested in the High Court under Article 235 of the Constitution.

(17) In the written statement filed by the State of Haryana, it has been emphasised that the impugned order has been passed after consulting the High Court. I have set out above the facts beginning with the letter of the High Court dated January 22, 1971. The High Court only recommended the reversion of the petitioner from the post of Additional District and Sessions Judge, which he was holding in an officiating capacity, to his substantive post of Senior Subordinate-Judge/Chief Judicial Magistrate and recommended that he should be retained in service till the age of 58 years in that post. On a reference back from the State Government, the High Court took the decision that the work of the petitioner as Senior Subordinate Judge/Chief Judicial Magistrate would be watched for a period of six months whereafter the necessary recommendation, whether to retain him in service or to dispense with his services, would be made. Ignoring this decision of the High Court, the State Government passed the impugned order. It has not been shown by the learned Advocate-General under which rule the consultation with the High Court by the State Government was necessary if under rule 5.32(c) *ibid*, the State Government had the absolute right to retire the petitioner by issuing the impugned order. The learned counsel, however, submitted that, as has been held by their Lordships in *Chandramouleshwar Prasad* v. *The Patna High Court and others*, (9), consultation does not mean that the State Government is bound to accept the proposal of the High Court. That was a case under Article 233(1) of the Constitution wherein the words "in consultation with" appear and is, therefore, not relevant as it did not concern the complete control vesting in the High Court under Article 235 of the Constitution. For this reason, the mere consultation with the High

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

Court was not enough in the present case. The State Government, in fact, had no jurisdiction to pass the impugned order because no recommendation to that effect had been made by the High Court.

(18) For the reasons given above, I hold that after a person is appointed to the Judicial Service of a State, the State Government becomes *functus officio* and the entire control-administrative, judicial and disciplinary-vests in the High Court and as long as that officer remains in service, all orders *qua* him in respect of his service have either to be passed by the High Court or by the State Government only on the recommendation of the High Court in respect of the matters over which the State Government has been given the jurisdiction under the provisions of the Constitution or the conditions of service governing the Judicial Service. The State Government on its own initiative cannot pass any order. In the present case, the impugned order has not been passed on the recommendation or initiation of the High Court but by the State Government on its own initiative against the recommendation of the High Court and is, therefore, liable to be struck down.

(19) In the written statement filed by the State of Haryana, the impugned order has been justified on the ground that it was passed in accordance with the instructions contained in the letter of the Chief Secretary dated May 19/21, 1964, referred to above, and was, therefore, valid. On the other hand, the petitioner has argued that in this very letter it has been stated :—

> "In considering whether an officer/official falls below the average standard, the question may sometimes arise as to whether he should be judged with reference to the requirement of his substantive grade or those of the grade in which he has been officiating. It is not unusual, for instance, for a Government employee who has earned good reports in his substantive grade to prove inadequate in the officiating grade. Ordinarily, his fitness to continue in service up to the age of 58 years may be judged in relation to his substantive grade, and if he is good enough for that grade but not for the higher grade in which he has been officiating, he may be reverted to his substantive grade but retained in service."

These executive instructions are meant for the guidance of the departmental heads and not justiciable at the instance of the Government servants. The petitioner cannot, therefore, be heard to say that the instruction set out above was not followed because under the rule the Government has the absolute power to retire a Government servant pre-maturely without assigning any reason. I have held above that the State Government had no jurisdiction to issue the order in the case of the petitioner unless the High Court had made a recommendation in that behalf and, therefore, the order is bad. If the order had been validly made, it could not be set aside on the ground urged by the petitioner. The argument of the petitioner is, therefore, repelled.

(20) The petitioner has alleged that the order was passed by the Government *mala fide* at the instance of Shri Bansi Lal, Chief Minister, Haryana, who bore a grudge against the petitioner. The basis of that allegation is that a case under sections 330/331, Indian Penal Code, was registered at Police Station Loharu on March 14, 1968, against Ratti Ram, Narinder Singh Lamba and others, Narinder Singh Lamba is admittedly the father's sister's son of Shri Bansi Lal. The accused were placed for trial before a Magistrate First Class who committed them to the Court of Sessions on June 15, 1970. The case was entrusted to the Court of the petitioner as Additional Sessions Judge, Hissar, and it came up for hearing before him on August 19, 1970. On that day, an application was filed by the Public Prosecutor seeking permission to withdraw from the prosecution. That application was rejected by the petitioner on that very day. The Public Prosecutor had filed that application under the instructions of the District Magistrate. A copy of the letter issued by the District Magistrate, Hissar, to the Public Prosecutor on August 18, 1970, has been filed as annexure R-1 with the written statement of respondent 1 and reads as under :—

"*Subject*:—Withdrawal from prosecution of case F.I.R. No. 20, dated 14.3.1968, under sections 330/342 I.P.C. of Police Station, Loharu.

Memorandum :

In this case Sultan Singh and Murli Ram accused made an application to me requesting that the Public Prosecutor should withdraw from prosecution in this case. I have had reports from

the Superintendent of Police and the District Attorney. In his report, the Superintendent of Police has said that some of the P.Ws. are interested persons and that the case is not strong enough. The District Attorney has given a detailed report bringing out discrepancies in the evidence which was given by the P.Ws. in the Court of Committing Magistrate. It has also reached my ears from many quarters that Shri Hira Nand Arya, Ex. M.L.A. has been taking undue and personal interest in this case in an attempt to secure conviction of the accused. He has imported local politics into this case.

2. The case has been dragging on for the past three years and the accused have already undergone enough mental agony and hardships. If even one innocent member of police force came to be punished it will have a dangerously demoralizing effect on the police force. In the present times the morale of the police force needs to be kept up, so that they can adequately deal with the bad elements in the society which are now on the increase.

3. You may, therefore, withdraw from prosecution of the accused in this case."

Shri Bansi Lal has denied in his affidavit that the District Magistrate instructed the Public Prosecutor to withdraw from the prosecution of the case at his instance. In the return filed by the State of Haryana, it has been mentioned that the District Magistrate and not the Chief Minister had instructed the Public Prosecutor to withdraw from the case. The District Magistrate has not been made a respondent to the petition nor has any replication been filed by the petitioner contradicting the allegations made by the Chief Minister and the State of Haryana on the point. It appears to me that some of the accused persons were members of the police force who moved the District Magistrate for withdrawal of the case against them. On the day the F.I.R. was recorded, Shri Bansi Lal was not the Chief Minister of Haryana. He became the Chief Minister of that State a little more than two months later and the commitment proceedings went on in due course in the Court of the Magistrate who passed the commitment order on June 15, 1970. If the Chief Minister was inclined to exercise his influence he could have done so when the case was pending in the Court of the Magistrate. The impugned order retiring the petitioner from service was issued on August 20, 1971, after correspondence with the High Court over a

period of more than six months. The reason which impelled the State Government to pass the impugned order, according to the written statement filed by respondent 1, was based on one of the instructions which had been issued on May 19/21, 1964, and it was felt that on account of reversion from the post of Additional District and Sessions Judge to that of Senior Subordinate Judge/Chief Judicial Magistrate, the petitioner was not likely to put his heart into his work in the substantive post. That reason cannot be said to be extraneous. In view of the categorical denial of the allegation of *mala fides* by the State Government and Shri Bansi Lal, I do not find any material on this record to hold that the impugned order was passed *mala fide* at the instance of respondent 3. The allegation of *mala fides* has been made by the petitioner recklessly without placing sufficient material on the record to support it. The petitioner has made this allegation on a mere inference drawn by him from his refusal to grant the application of the Public Prosecutor in a case in which a cousin of the Chief Minister was one of the accused persons.

(21) For the reasons given above, this petition is accepted and the impugned order dated August 20, 1971, retiring the petitioner from service after the expiry of three months is hereby quashed. The petitioner is not entitled to any costs because of the reckless allegation of *mala fides* made against respondents 1 and 3. The parties are, therefore, left to bear their own costs.

H. R. Sodhi, J.—

(22) I have had the privilege of going through the judgment of my brother B. R. Tuli, J., and with great respect to him I have not been able to persuade myself to share his views except in regard to the conclusion reached about the alleged *mala fides* against respondent 3. Facts need not be recapitulated in all their details but some of them require to be stated.

(23) The petitioner is a member of the Haryana Civil Service (Judicial Branch) and he attained the age of 55 years on 24th February, 1971. The High Court recommended to the State Government that the petitioner be permitted to continue till the age of 58 years which is the age of superannuation as provided in rule 3.26 of the Punjab Civil Service Rules, as applicable to the State of Haryana and hereinafter called the Rules. The petitioner had earlier been promoted as officiating District and Sessions Judge of

which office he took charge on 1st April, 1970. The High Court found that he was not fit to continue in this office as his work on the civil side was unsatisfactory. A recommendation was made to the State Government by a letter dated 22nd January, 1971, that in view of the unsatisfactory work of the petitioner as Additional District and Sessions Judge, he should be reverted to his substantive post of Senior Subordinate Judge/Chief Judicial Magistrate, but allowed to continue as such up to the age of 58 years. The State Government agreed to the reversion of the petitioner but wrote back saying that the High Court should consider whether the petitioner should at all be retained in service beyond the age of 55 years. The High Court again on 6th April, 1971, addressed the State Government in the following terms :—

> "That the work of the petitioner as Senior Sub-Judge/Chief Judicial Magistrate will be reviewed after he has worked for 6 months as such and if he is found wanting, it will be recommended to the State Government to retire him after giving him the requisite notice."

The State Government did not accept this recommendation and drew the attention of the High Court to the Punjab Government letter No. 4776-3GS-(1) 64/15823, dated the 19th/21st May, 1964, an extract wherefrom reads as under :—

> "There may be difficulties when a Government employee has been officiating in a higher grade for a long time and it appears unlikely that he would put his heart into his work after reversion. This, however, is a question on which no hard and fast rules can be laid down and each case will have to be considered on its own merits."

The Government was of the view that after the reversion of the petitioner from the post of Additional District and Sessions Judge to that of Senior Sub-Judge/Chief Judicial Magistrate, the petitioner was not likely to work whole-heartedly and, therefore, it would be in public interest to retire him after giving him three months' notice, as envisaged in rule 5.32(C) of the Punjab Civil Service Rules, Volume II. Correspondence passed between the Government and the High Court but the former insisted that it was not in public interest to retain the petitioner in view of the instruction referred to above. It was claimed that the State Government alone was competent to take final decision after the High Court had been

consulted. A notice dated 20th August, 1971, of retirement under rule 5.32(c) was consequently served on the petitioner by the Governor of Haryana through the Chief Secretary directing the petitioner to retire from service on the expiry of three months from the date of receipt of this notice. It reads as under :—

> "I am directed to say that the Governor of Haryana, in consultation with the Punjab and Haryana High Court has decided that you shall be retired from service in accordance with the provisions of note appended to rule 5.32(C) of the Punjab C.S.R. Volume II, as applicable to the State of Haryana.
>
> (2) You are, therefore, hereby given notice that on the expiry of three months from the date of the receipt of this communication, you shall retire from service under the Haryana Government."

(24) The petitioner then filed the present writ petition in which he challenges the jurisdiction of the State Government to serve any notice of compulsory retirement on him it being pleaded that such a control under the Constitution vests only in the High Court. The allegations of *mala fides* have been made against the Chief Minister of Haryana—respondent 3. It is alleged that while the petitioner was posted as Additional District and Sessions Judge at Hissar, a criminal trial resulting from the registration of a case under section 330/342 Indian Penal Code, in respect of a theft case was to start in his Court on 19th August, 1970, against one Shri Narinder Singh Lamba and others, when the Public Prosecutor, Shri S. N. Goel, made an application for withdrawal of prosecution against the accused under section 494, Criminal Procedure Code. The petitioner declined this request and ordered the trial to continue. A revision petition was filed against his order but the same was dismissed by the High Court. The case of the petitioner is that Shri Narinder Singh Lamba, one of the accused in that case, is the father's sister's son of the Chief Minister and that the case was, no doubt, registered when Shri Bansi Lal was not the Chief Minister, but the withdrawal application had been made presumably at his instance and refusal on the part of the petitioner to allow withdrawal gave annoyance to him. The averment is that the petitioner did all this *bona fide* in the discharge of his duties and could not permit withdrawal of the case when the committing Magistrate had recorded the evidence of as many as seven witnesses in support of the charge before committing the case.

(25) When the writ petition came up before the Division Bench consisting of my brother Mahajan J. and myself, we were of the view that since an important question relating to jurisdiction in respect of the exercise of power in the matter of compulsory retirement of a judicial officer, after he had attained the age of 55 years, was involved, it was a fit case to be disposed of by a larger Bench. It is in these circumstances that case is before the Full Bench.

(26) The petitioner argued the case himself, the High Court was represented by Mr. H. L. Sibal, Advocate-General, Punjab and Mr. J. N. Kaushal appeared for the State of Haryana.

(27) I must say at the outset, that it is a matter of regret that an unfortunate issue disclosing a conflict between the High Court and the State Government as regards the desirability of retaining the petitioner in service after the age of 55 years has been raised. As observed by my Lord Hegde, J., in *State of Orissa* v. *Sudansu Sekhar Misra and others*, (10), our Constitution expects that "they should act in such a way as to advance public interest. If they act with that purpose in view as they should, then there is no room for conflict and no question of one dominating the other arises. Each of the organs of the State has a special role of its own. But our Constitution expects all of them to work in harmony in a spirit of service". No attempt should, therefore, be made by one to encroach upon the rights and powers of the other. It is of the essence of mutual goodwill and understanding between the High Court and the Government that each attributes *bona fides* to the other unless something to the contrary is proved beyond shadow of doubt. The vast organisation of the governmental machinery in a democratic set up, which includes all the three wings of the State, viz., legislature, executive and the judiciary, is founded on the assumption of good faith on the part of all of them motivated by a desire for public service. Independence of judiciary is, undoubtedly, of the highest importance and judiciary at any level should not be placed in a situation where it has to look to an executive authority for benefits. It is true that judicial independence and democracy are close to each other as skin and skeleton. To maintain such independence, control over subordinate judiciary in a State should vest in the High Court of that State and it is so provided in Article 235 of the Constitution. The importance of such independence, if I may say so with all respect, has been lucidly emphasised by their Lordships of the Supreme Court in *The State of West*

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

Bengal v. *Nripendra Nath Bagchi,* (5). It is, therefore, most desirable that the recommendations of a High Court, whatever be the constitutional position, should normally be accepted by the State Government and the latter will be well-advised in not creating a situation resulting in a confrontation. Be that as it may, we cannot at the same time ignore the written constitution which has assigned to different wings their independent functions, and each of them has to exercise its powers within the sphere of its jurisdiction, in order to discharge duties entrusted to it by the Constitution. The whole approach is to be made as a realist and an attempt on the part of either the High Court or the Executive Government to have supremacy over the other, when it is not so permitted under the law, cannot be much appreciated. Whatever be the extent of control exerciseable by the High Court over its officers or desirable to be so exercised, there is no escape frôm the hard reality that be it a judicial officer or any other Government servant, he holds his civil post in the State during the pleasure of the Governor. This pleasure doctrine which is based on the ordinary law of master and servant is stated in Article 310 of the Constitution with the inevitable consequence that no servant can be foisted on the Governor who alone is the employer. If any authority subordinate to the Governor has been made the appointing authority in regard to a particular service, that authority exercised only a delegated power. For smooth co-ordination between a High Court and the State, some constitutional conventions or understandings are necessary and one of them is that the Governor in the exercise of his powers under the Constitution in relation to judicial service, no matter he may have the final authority to dismiss, remove or reduce in rank a judicial officer, must accept the advice of the High Court. When a question, however, arises as to whether the High Court or the State Government has powers in regard to certain matters, the Constitution has to be interpreted in a manner so as to advance its object without doing violence to the plain meaning of the words used therein or the intention lying thereunder. Our duty as Courts of law is to ascertain what law is and not what it should be. Conventions howsoever commendable cannot be enforced through a Court. Whatever may be considered to be more appropriate or administratively expedient in a particular case, there is no escape from the constitutional position that power in the matter of dismissal or removal from service of a judicial officer vests in the Governor. The expression "Governor" as used in Article 234 which deals with subordinate judiciary means the State Government and not the Governor in his individual capacity. An employee has no right to insist

to continue in service and a remedy for wrongful dismissal or termination of his services or breach of conditions of the contract of service is normally an action for damages in a civil Court. A Government servant if he gets a right to enforce the obligations of his employer, namely, the State Government, in regard to continuance in service, it is by virtue of the statutory status given to him under a statute or statutory rules, violation of which must not be permitted and a civil Court will interfere even sometime to give a declaration that an order terminating his services is void and ineffective in law and that he still continues in service. This in nut-shell is the position of a Government servant, including a judicial officer, in regard to his legal relationship with the employer which is the State Government.

(28) Before adverting to the various contentions raised by the learned counsel for the parties, I feel it necessary to reproduce hereunder the relevant rules and those provisions of the Constitution on which the whole controversy hinges:—

The Punjab Civil Services Rules, Volume I, Part I.

COMPULSORY RETIREMENT

3.26 (a) Except as provided in other clauses of this rule, the date of compulsory retirement of a Government servant other than a Class IV Government servant, is the date on which he attains the age of 58 years. He must not be retained in service after the age of compulsory retirement, except in exceptional circumstances with the sanction of competent authority on public grounds, which must be recorded in writing.

The Punjab Civil Service Rules, Volume II—(Government of Haryana, Finance Department).

5.32. (a) A retiring pension is granted to a Government servant who is permitted to retire from service after completing qualifying superior service for twenty-five years or such less time as may for any special class of Government servants be prescribed.

(b) A retiring pension is also granted to a Government servant who is required by Government to retire after completing

twenty-five years' qualifying service or more and who has not attained the age of fifty-five years.

Note 1.—Government retains an absolute right to retire any government servant after he has completed 25 years of service qualifying for pension if he is holding a pensionable post or has completed service for a similar period if he is holding a non-pensionable post, but is entitled to the benefits of Contributory Provident Fund, without giving any reasons and no claim to special compensation on this account will be entertained. This right will not be exercised except when it is in the public interest to dispense with the further services of a Government servant such as on account of inefficiency, dishonesty, corruption or infamous conduct. Thus clause (b) of this rule is intended for use :—

(i) against a Government servant whose efficiency is impaired but against whom it is not desirable to make formal charges of inefficiency or who has ceased to be fully efficient (i.e. when a Government servant's value is clearly incommensurate with the pay which he draws) but not to such a degree as to warrant his retirement on a compassionate allowance. It is not the intention to use the provisions of this note as a financial weapon, that is to say, the provision should be used only in the case of Government servants who are considered unfit for retention on personal as opposed to financial grounds ;

(ii) in cases where reputation for corruption, dishonesty or infamous conduct is clearly established even though no specific instance is likely to be proved under the Punishment and Appeal Rules, Appendix 24 of Volume I, Part II, of these rules or the Public Service (Inquiries Act XXXVII of 1850).

The word 'Government' used in this note should be interpreted to mean the authority which has the power of removing the Government servant concerned from service under the Civil Services (Punishment and Appeal) Rules.

Note 2.—Government servant should be given a reasonable opportunity to show cause against the proposed action under clause (b) of this rule. No gazetted Government servants shall, however, be retired without the approval of council of Ministers. In all cases of

compulsory retirement of Gazetted Government servants belonging to the State Services, the Public Service Commission shall be consulted. In the case of non-gazetted Government servants the Head of Departments should effect such retirement with the previous approval of the State Government.

Note 3.—A Government servant who has elected to retire under this Rule and has given necessary intimation to that effect to the competent authority, shall be precluded from withdrawing his election subsequently except with the specific approval of the authority competent to fill the appointment : provided his request for withdrawal is made within the intended date of his retirement.

(c) A retiring pension is also granted to a Government servant other than a Class IV Government servant—

(i) who is retired by the appointing authority on or after he attains the age of 55 years, by giving him not less than three months' notice; and

(ii) who retires on or after attaining the age of 55 years by giving not less than three months' notice of his intention to retire to the appointing authority :

Provided that where the notice is given before the age of fifty-five years is attained, it shall be given effect to, from a date not earlier than the date on which the age of fifty-five years is attained.

Note.—Appointing authority retains an absolute right to retire any Government servant, except a Class IV Government servant, on or after he has attained the age of 55 years without assigning any reason. A corresponding right is also available to such a Government servant to retire on or after he has attained the age of 55 years."

Articles of the Constitution of India.

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

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge

if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

234. Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.

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

(29) It will also be useful at this stage to refer to the procedure to be followed in regard to the appointment of subordinate judicial officers. There are in force the Punjab Civil Service (Judicial Branch) Rules, 1951, called hereinafter—the Judicial Service Rules, framed by the Governor of Punjab in exercise of the powers conferred on him by Article 234 read with proviso to Article 309 of the Constitution. These rules have been adopted by the State of Haryana as well, and were framed after consultation with the State Public Service Commission and the High Court of the erstwhile composite Punjab. Part-A of these rules deals with qualifications for persons to be appointed as Subordinate Judges. A competitive examination is held and candidates are selected for appointment strictly in the order of merit by the Public Service Commission and a list of those who qualify is prepared. In case of candidates belonging to the Scheduled Castes/Tribes and other Backward Classes, *Government has, under rule* 10 *of Part C, reserved to itself a right to select in order of merit a candidate who has merely qualified under rule* 8, *irrespective of the position obtained by him in the examination.* Part-D of the Judicial Service Rules deals with appointments. A liaison is maintained between the Government and the High Court inasmuch as the names of

candidates selected by the Government for appointment as Subordinate Judges are entered in a register to be maintained by the High Court. The Registrar of the High Court from time to time scrutinizes this register and he must under orders of the Judges remove therefrom the name of any candidate who has exceeded the age-limit prescribed before he can be appointed as a Subordinate Judge. Under rule 4 of Part D, the Government, *on a motion from the Judges,* has a power to remove from the High Court register the name of any candidate borne on it. The motion can be made by the Judges if they find that a selected candidate is not fit to be retained on the list. This rule is in the following terms :—

> "4. The Government may, on a motion from the Judges, for any reason which may seem fit to them, remove from the High Court Register the name of any candidate borne on it."

A Subordinate Judge is, in the First instance, appointed under rule 7(1) of Part-D on probation for two years which period may be extended from time to time expressly or impliedly so that the total period of probation including extension, if any, does not exceed three years. Rule 7(2) gives power to the Governor, on the recommendation of the High Court, to dispense with the services of a probationer during the period of his probation without assigning any cause. A plain meaning of the rule is that unless the High Court recommends, the Governor cannot, at his own, take any action under this rule and dispense with the services of a probationer. On the completion of the period of probation, power is given to the High Court specifically to make a recommendation to the Governor as to whether the probationer should be confirmed or not in view of his work or conduct. It is open to the High Court to make a report about the work and conduct of such an officer before the period of probation has run out and the Governor may then dispense with the services of the probationer or revert him to his substantive post. In the matter of departmental examination, a Central Committee is set up and the constitution of that committee is not confined to the High Court Judges alone but, on the other hand, the Chief Justice is only one of the members of that Committee, the other members being the senior Financial Commissioner and the Chief Secretary to the Government. Presumably because the Government is the appointing authority, it has with consent of the High Court maintained control by constituting a committee majority of members of which are from the executive. There is then Part-F of the Judicial Service Rules which deals with discipline, penalties

and appeals. The Punjab Civil Service (Punishment and Appeals) Rules, 1952, as amended from time to time, have been made applicable to judicial officers and authorities empowered to impose various penalties or pass orders and the appellate authorities are indicated in Appendices 'A' and 'B', which are reproduced hereunder :—

APPENDIX 'A'

Nature of penalty	Punishing Authority	Appellate Authority
(a) Censure	Judge of the High Court, Punjab	Division Bench of the High Court, Punjab
(b) Withholding of increment or promotion, including stoppage at an efficiency bar	Ditto	Ditto
(c) Reduction to a lower post or time scale or to a lowe stage in the time scale	Government	—
(d) Recovery from pay of the whole or part of any pecuniary loss caused to Government by negligence or breach of order	Judge of the High Court, Punjab	Division Bench of the High Court
(e) Suspension	Government	...
(f) Removal from the service which does not disqualify for future employment	Ditto	..
(g) Dismissal from the service which ordinarily disqualifies from future employment	Ditto	..

APPENDIX 'B'

Nature of order	Authority competent to pass an order	Appellate Authority
(a) Reducing the maximum pension under the rules	Government	...
(b) Terminating the appointment of a member of the service otherwise then upon his reaching the age fixed for superannuation	Ditto	..

Clause (b) of Appendix 'B' is pertinently relevant whereby power of termination of service of a judicial officer otherwise than upon the reaching of the age of superannuation is given to the State Government. It is conceded by Mr. Sibal, appearing for the High Court,

that the expression 'termination' as used here is wide enough to include not only dismissal or removal by way of punishment but also termination of services for any cause whatsoever including compulsory retirement at the age of 55 years. The concession of Mr. Sibal is well founded since we find that Part-F opens with language wide enough to include not only orders relating to discipline, penalties and appeals but to all the matters as are specified in Appendix 'B'. Again, clauses (f) and (g) of Appendix 'A' relate to removal and dismissal from service and authority competent to pass an order to this effect is the Government and no appeal against such an order has been provided. When there is termination otherwise than by removal or dismissal, the State Government is made the competent authority and no right of appeal against its order is available to the aggrieved officer. No procedure is prescribed giving any indication as to whether it is obligatory that the High Court must initiate the proposal before services of a judicial officer are terminated by way of compulsory retirement on attaining the age of 55 years, though in case of a probationer it is specifically provided that his services cannot be dispensed with without a recommendation of the High Court. Suspension of a judicial officer can, under these rules, be ordered only by the Government and not by the High Court.

(30) A perusal of the scheme of Judicial Service-Rules leaves no room for doubt that the High Court, which was consulted when the said rules regulating the recruitment were framed, as envisaged in Article 234 and proviso to Article 309 of the Constitution, accepted that the power of termination could be exercised by the Government without a recommendation to that effect by the High Court. The case of termination of services has indeed been placed in a separate category and the State Government alone is given authority to exercise power in this regard.

(31) I may next advert to the other two rules, namely, rule 3.26 of the Punjab Civil Services Rules, Volume I, Part I, and rule 5.32 of the Punjab Civil Service Rules, Volume II, It will be useful to briefly state the substance of these two rules as they existed before they assumed the present form. Counsel for the parties concede that these rules are applicable to judicial officers as well, except that it is contended on behalf of the petitioner and the High Court that they must be read subject to the provisions of Article 235 of the Constitution. Before the year 1963, the age of superannuation for a Government servant other than class IV Government servant was 55 years.

It was only with effect from 28th March, 1963, that the age of superannuation was raised to 58 years with a note to the effect that those who had attained the age of 55 years on or after 1st December, 1962, could be permitted to resume duty at the discretion of the Appointing Authority. Nothing was stated in the rules as to under what circumstances a Government servant, after having reached the age of 55 years, could be permitted to resume duty and an absolute authority in this regard was given to the Appointing Authority. The matter of retiring pension and the conditions under which it could be granted are dealt within rule 5.32. This rule has undergone various changes in regard to compulsory retirement before the age of superannuation but when the age of superannuation was raised to 58 years in the year 1963, a change was made in this rule as well and it is the amended rule as it operates now that has been reproduced above. By raising the age of superannuation to 58 years, the appointing authority, which in the case of judicial officers too is indisputably the State Government, retained an absolute right to retire any such official on or after he had attained the age of 55 years without assigning any reason. A corresponding right is made available to such Government servant to retire on or after attaining the age of 55 years. The only pre-requisite for retiring an officer at the age of 55 years which prior to the year 1963 was the age of superannuation, is that three months' notice on either side is necessary before the officer voluntarily chooses to retire or is asked by the Government to retire. In other words, whatever right was conferred on the Government servant by amendment of rule 3.26 *ibid* to continue in service uninterruptedly subject to good conduct upto the age of 58 years was simultaneously whittled down by introducing an amendment in rule 5.32 of the Punjab Civil Service Rules, Volume II, making it optional both for the State Government and the Government servant to terminate the service by serving three months' notice, with a further rider that the appointing authority has an absolute right to terminate services of a Government servant without assigning any reason so that the matter is not left in any doubt. These rules cannot be read in isolation and if they are read together, the only irresistible and reasonable conclusion is that by virtue of amendment of the statutory rules the terms and conditions of service of a Government servant get changed as and when he attains the age of 55 years. To put it differently, whatever legal right a Government servant could have to continue in service upto the age of superannuation viz., 58 years, because of his status as a Government servant in view of the statutory rules, regulating the terms and conditions of his service is not available to him in absoluteness and on reaching the age of 55 years the only right that he has is to three months' notice before his services are terminated.

(32) A Full Bench of this Court had an occasion to consider the true import of such termination and the impact of rules 3.26—and 5.32 in *Pritam Singh Brar* v. *The State of Punjab and others,* (2). Validity of these rules was challenged on various grounds and it was urged that the rule permitting the appointing authority to retire a Government servant on attaining a particular age without assigning any reason was arbitrary offending against Article 14 of the Constitution. Grover, J., as His Lordship then was, in delivering judgment of the Court upheld the validity of rule 5.32, it being observed that rule 3.26 and rule 5.32 must be read together and that the classification of Government servants into two groups, one consisting of those who had put in 25 years of qualifying service and had not attained the age of 55 years and those who had attained the age of 55 years was based on a reasonable and rational hypothesis. Reliance in this connection was placed on a judgment of the Supreme Court in *The State of Bombay* v. *Saubhagchand M. Doshi,* (11), wherein the validity of the provisions contained in rule 165-A of the Bombay Civil Service Rules was upheld. Under that rule, the Government had power to terminate the services of a Government servant without assigning any reason if he had completed 25 years qualifying service or attained the age of 50 years. The scope of these rules again came up for consideration by another Full Bench in *Punjab State* v. *Mohan Singh Mahli* (3), and the majority judgment was delivered by Mahajan, J. Mohan Singh who had been appointed Director, Animal Husbandry, was served an order for his retirement on payment of three months' salary and allowances in lieu of the notice required under rule 5.32 of the Punjab Civil Services Rules, Volume II, after he had completed the age of 55 years. The question that arose for determination was whether under rule 5.32(c), the Government could retire an employee after he had attained the age of 55 years by giving him three months salary and allowances in lieu of three months' notice. One of the contentions raised was that the Government servant had an absolute right to continue in service upto the age of 58 years and that rule 5.32 relating to grant of pension could not control or limit the content and amplitude of the provisions contained in rule 3.26. This contention was repelled as was done in *Pritam Singh Brar's case* (2). The learned Judge observed that "under rule 5.32 the Government has the absolute right to terminate the services of its employees who have attained the age of 55 years and the only requirement is that before termination the employee should be given three months' notice; it clearly follows that there

(11) A.I.R. 1957 S.C. 892.

would be no breach of the rule if instead of notice, three months' wages are given. Rule 5.32 is merely an enabling rule". There is an other observation of the learned Judge to the same effect,—"That means that he has a right to continue in service up to 55 years and not 58 years and thereafter, he can be made to retire after complying with rule 5.32(c)."

(33) An attempt was made by Mr. Sibal in *P. N. Gupta, H.S.E. (I), Superintending Engineer, Western Jumna Canal, West Circle, Rohtak* v. *The Secretary to Government, Haryana, Public Works Department, Chandigarh,* (12), decided by Mahajan and Sandhawalia, JJ. to persuade the Division Bench to refer the case to a larger Bench as it was argued that the view of law taken in two Full Bench decisions in *Pritam Singh Brar's* (2) case and *Mohan Singh Mahli's case* (3) was not correct. This contention of Mr. Sibal was repelled and the decision in the Full Bench cases held to be good law.

(34) Having noticed the state of law as it emerges from the various rules and the decided cases referred to above, the question that survives for consideration is as to what is the effect of Article 235 on the authority of the State Government to terminate the services of a subordinate judicial officer on his attaining the age of 55 years by way of compulsory retirement on three months' notice under the right reserved to it by rule 5.32 and Appendix 'B' to Part-F of the Judicial Service Rules and what are the procedural requirments or conditions precedent to the exercise of that authority. The question posed before us is that unless the High Court initiates a proposal for the termination of the services of a judicial officer under rule 5.32, the Government has no jurisdiction to serve notice of termination nor can the Government refuse to accept the advice of the High Court in this regard. The petitioner who appeared in person could not give much assistance, but Mr. Sibal, appearing for the High Court, strongly contended that in view of the dictum of their Lordship of the Supreme Court in *Nripendra Nath Bagchi's case* (5) and reiterated in subsequent decisions, the administrative and disciplinary control over judicial officers vests solely in the High Court and the necessary consequence of this power of control is that the Governor can pass the order of termination in a case like the present one only if a recommendation to that effect is made by the High Court It is urged that if the control of the High Court is not to be rendered a mockery and the independence of judiciary is to be maintained,

(12) C.W. 502 of 1969 decided on 2nd April, 1970.

rule 5.32 giving absolute right to the State Government should be read as controlled by Article 235 with the inevitable result that the State Government gets jurisdiction to terminate the services of a judicial officer on three months' notice only if the High Court were to recommend such an action. The submission is that the word "control" as used in Article 235 should not be given a restricted meaning and termination of service squarely falls within the ambit of such control.

(35) Mr. Sibal further vehemently contends that the terms and conditions of service could be ignored by the High Court in exercising control under Article 235 since the High Court "is made the sole custodian of control over the judiciary", or at any rate the rules relating to terms and conditions must be read subject to Article 235. He in this connection relies on the following observations of their Lordships of the Supreme Court in *Nripendra Nath Bagchi's case* (5) (supra)—

> "We do not accept this construction. The word "control" is not defined in the Constitution at all. In Part XIV which deals with Services under the Union and the States the words "disciplinary control" or "disciplinary jurisdiction" have not at all been used. It is not to be thought that disciplinary jurisdiction of services is not contemplated. In the context the word "control" must, in our judgment, include disciplinary jurisdiction. Indeed, the word may be said to be used as a term of art because the Civil Services (Classification, Control and Appeal) Rules used the word "control" and the only rules which can legitimately come under the word "control" are the Disciplinary Rules. Further, as we have already shown, the history which lies behind the enactment of these articles indicates that "control" was vested in the High Court to effectuate a purpose, namely, the securing of the independence of the subordinate judiciary and unless it included disciplinary control as well the very object would be frustrated. This aid to construction is admissible because to find out the meaning of a law, recourse may legitimately be had to the prior state of the law, the evil sought to be removed and the process by which the law was evolved. The word "control", as we have seen, was used for the first time in the Constitution and it is accompanied by the word "vest" which is a strong word. It shows that the High Court is made the sole custodian of the control over the judiciary.

> Control, therefore, is not merely the power to arrange the day to day working of the court but contemplates disciplinary jurisdiction over the presiding Judge. Article 227 gives to the High Court superintendence over these courts and enables the High Court to call for returns etc. The word "control" in Article 235 must have a different content. It includes something in addition to mere superintendence. It is control over the conduct and discipline of the Judges. This conclusion is futher strengthened by two other indications pointing clearly in the same direction. The first is that the order of the High Court is made subject to an appeal if so provided in the law regulating the conditions of service and this necessarily indicates an order passed in disciplinary jurisdiction. Secondly, the words are that the High Court shall "deal" with the Judge in accordance with his rules of service and the word "deal" also points to disciplinary and not administrative jurisdiction."

Support to the argument—is sought from three other decisions of the Supreme Court in *Chandra Mohan* v. *State of Uttar Pradesh and others* (13), *The State of Assam* v. *Ranga Muhammad and others* (6), and *State of Orissa* v. *Sudhansu Sekhar Misra and others* (10).

(36) Mr. J. N. Kaushal, on the other hand, propounded the following propositions :—

(a) Control of the High Court under Article 235 is subject to the rules framed by the Governor whether under Article 234 or proviso to Article 309 of the Constitution.

(b) Disciplinary action against a judicial officer may have to be initiated by a High Court but when no question of any such action is involved and the termination is sought to be effected in accordance with the terms and conditions of the service of an officer as laid down in the statutory rules applicable to his service, it is not necessary under the law that the High Court should initiate the proposal or that the Government cannot differ from recommendations of the High Court. It is urged that the provision of termination of service on three months' notice on either side, as introduced in the rules relates to the terms and conditions

(13) A.I.R. 1966 S.C. 1987.

of service of the officer and the control can be exercised by the High Court subject to such terms and conditions only. Control, as urged by the learned counsel, is exerciseable during the continuance in service, but the question whether an officer should, after the age of 55 years, be retained in service or not is not a matter of control but akin to appointment, dismissal or removal from service for which power vests only in the State Government.

(c) That a judicial officer, after attaining the age of 55 years has no legal right to continue in service, and rule 5.32 introduces a fresh condition of service. The argument is that once it is decided that the officer should continue in service, the control will certainly vest in the High Court as long as he remains in service, but the question of retention in service must not be mixed up with that of control.

(d) It is lastly contended that the High Court was consulted in the instant case though the Government took a different view which, as urged by the learned counsel, has been taken in public interest in the light of the standing instructions as contained in letter No. 4776-3GS-(1)64/15823, dated the 19th/21st May, 1964. It is submitted that the stand of the High Court was inconsistent and indefensible inasmuch as in one breath it found the work of the petitioner not to be satisfactory on the civil side and reverted him from the post of the Additional District Judge and at the same time it recommended that the officer be retained as Senior Subordinate Judge in which post too his work was still to be watched for six months. An officer who was not found fit to do civil work as Additional District Judge could not be reasonably considered fit to do the same type of work as Senior Subordinate Judge and to allow such an officer to continue after the age of 55 years could not possibly be in public interest.

(e) That the allegations of *mala fides* as levelled by the petitioner against respondent 3 are malicious and ill-founded.

(37) After giving my careful thought to the matter, I find force in the contentions of Mr. Kaushal. Terms and conditions of Government servants, including judicial officers, are regulated by rules

framed by the Governor under proviso to Article 309 of the Constitution. Rules for subordinate judicial service in respect of appointments only are to be framed under Article 234 of the Constitution, after consultation with the State Public Service Commission and the High Court. Conditions of service cover a vast field including pension, leave, allowances, etc., and rules with regard to them are not covered by Article 234. The matter of compulsory retirement is one relating to the terms and conditions of service and howsoever wide may be the amplitude of control given to the High Court under Article 235, over judicial officers, it can be exercised only in accordance with their terms and conditions of service. The control vests in the High Court so long as a judicial officer remains in service and not that the question of his continuance in service at the age of 55 years or thereafter which is a matter primarily between the employer (the State Government) and its employees, becomes a matter of control within the meaning of Article 235. Such a question, to my mind, pertains to the conditions of service only. When the age of 55 years is reached in Government service, terms and conditions stand varied automatically by virtue of the statutory rules and a new condition is introduced that the service is terminable on three months' notice on either side. A plain reading of Article 235 makes it abundantly clear that this Article enjoins upon a High Court not to deal with a judicial officer in the exercise of its power of control except in accordance with the conditions of his service as may be prescribed under the law. There is no breach of Article 235, therefore, involved when the State Government terminates the services of such an officer on three months' notice on or after his attainment of the age of 55 years as permitted by rules relating to conditions of service. It is not correct to assume that the State Government will exercise its power to keep judiciary under its thumb and use the same as sword of Damocles hanging over judicial officers so that they have to look to the executive for continuance in service after the age of 55 years. Such an approach cannot be defended in law. Power to make rules to regulate the terms and conditions of service whether of judicial officers or any other Government servant is given only to the Governor under Article 309 and this power is untrammelled except to the extent that it is to be exercised subject to the other provisions of the Constitution. Articles 233 and 234 are concerned only with initial appointments to judicial service and have nothing to do with the conditions of that service and age of superannuation. Tenure of service is beyond doubt a condition of service with regard to which the Governor alone has the power to make rules under Article 309

of the Constitution. There is yet another approach. The power to appoint includes power to suspend or dismiss any person appointed as provided in section 16 of the General Clauses Act, 1897. In the Judicial Service Rules framed under Article 234, a detailed reference to which has already been made, the power of termination under Appendix 'B' has been given to the State Government. There is, therefore, no room for doubt that from whatever angle the question be viewed, the power of appointment and termination whether that termination is by way of dismissal or removal or otherwise, is with the Government.

(38) I am afraid the dictum in *Nripendra Nath Bagchi's case* (5) is being pursued too far without bearing in mind the circumstances in which the observations were made. Nripendra Nath Bagchi, who was an Additional District and Sessions Judge in the State of West Bengal was due to superannuate and retire on July 31, 1953. He applied for leave preparatory to retirement but was retained in service for a period of two months commencing from August 1, 1953, in order to hold an inquiry against him. By an order dated July 20, 1953, he was placed under suspension and on the following day he was served with 11 charges to which he was asked to file a written reply within fifteen days. All this was done by the State Government without any reference to the High Court. An inquiry into the charges was entrusted to a Commissioner and it lasted for a long time. Mr. Bagchi continued to remain under suspension. The Commissioner reported that the charges were proved and after a second show-cause notice had been served on him by the State Government he was ultimately dismissed from service. The Public Service Commission was consulted but not the High Court. He appealed to the Governor but with no success and ultimately applied to the High Court under Articles 226 and 227 of the Constitution to get the order of his dismissal quashed. A Full Bench of the Calcutta High Court by its judgment dated July 1, 1960, quashed the order of dismissal as well as the inquiry. An appeal by the State Government to the Supreme Court was dismissed and the above-quoted observations relied upon by Mr. Sibal made.

(39) Decision in *Nripendra Nath Bagchi's case* (5) must be confined to its own peculiar facts. There an inquiry against a District Judge was launched and punishment awarded without the High Court knowing anything about it what to say of its having been consulted. Such disciplinary action on the part of the Government

against a judicial officer was held to be wholly without jurisdiction in view of Article 235 and directive principles of the Constitution meant for maintaining independence of judiciary. Emphasis was laid by their Lordships on the word "deal" also which was held to point to disciplinary and not to mere administrative jurisdiction. The word "deal" in its ordinary dictionary meaning does not mean exercise of disciplinary power alone but includes acting in mutual relation. This case is not intended to give the High Court power to change the terms and conditions of a judicial officer particularly when it is specifically laid down in Article 235 that nothing stated therein is to be so construed as to authorise the High Court to deal with a judicial officer except in accordance with the conditions of his service prescribed under the law. If once it is held that tenure of office or the matter of compulsory retirement on three months' notice on attaining the age of 55 years is a condition of service of a judicial officer, Article 235 prohibits the High Court from dealing with him except in accordance with the rules relating to such conditions one of which obviously is that the Government has the power to terminate his services on his attaining the age of 55 years.

(40) In *Ranga Muhammad's case* (6) what is held is that the transfer of a District Judge or of that any judicial officer is included in control exerciseable by the High Court under Article 235 and the State Government has no authority in this regard. Article 233 gives power to the Governor of the State in respect of appointments, postings and promotions of District Judges and this power is to be exercised in consultation with the High Court of the State concerned. The power of appointment, posting and promotion was held not to include the power of transfer of District Judges already appointed or promoted and posted to the cadre. Transfer was, however, held to fall within the ambit of control it being observed that "the High Court is better suited to make transfers than a Minister. For, however, well-meaning a Minister may be he can never possess the same intimate knowledge of the working of the judiciary as a whole and of individual Judges, as the High Court. He must depend on his department for information. The Chief Justice and his colleagues know these matters and deal with them personally. There is less chance of being influenced by secretaries who may withhold some vital information if they are interested themselves." As the High Court is held to be the authority competent to make transfers, there would be, therefore, no question of consulting the State Government in this respect. Another question that arose for consideration was

whether the provision relating to consultation in Articles 233 and 235 was mandatory or directory and the only observation made in this respect by their Lordships is that, "Consultation loses all its meaning and becomes a mockery if what the High Court has to say is received with ill-grace or rejected out of hand. In such matters the opinion of the High Court is entitled to the highest regard".

(41) *Chandra Mohan's case* (13) raised a question about the validity of the U.P. Higher Judicial Service Rules for recruitment of District Judges. A Selection Committee constituted under these rules selected candidates for appointment to the service. Three of the selected candidates were advocates and three judicial officers. A list of all these six candidates was sent to the High Court. The High Court approved the selection and communicated its approval to the Secretary to the Uttar Pradesh Government. Chandra Mohan who belonged to the U. P. Civil Services (Judicial Branch) and was at that time acting as a District Judge along with some other officers who were similarly situated filed writ petitions in the High Court of Allahabad under Article 226 of the Constitution for the issue of an appropriate writ directing the Government not to make the appointments. On a difference of opinion between two Judges, the case was referred to a third learned Judge, and the petitions were ultimately dismissed. The appointments were challenged on the ground that while under Article 233(1) of the Constitution, the Governor has alone to make appointments of persons as District Judges in consultation with the High Court concerned, the rules made by the Governor under Article 309 provided for the constitution of a selection committee and that the appointments were made not only in consultation with the High Court, but also with that Committee. It was urged that the constitution of two authorities for consultation instead of one, namely, the High Court, as contemplated by the Constitution made the appointments illegal and the rules to that effect were unconstitutional. The substance of the argument was that the rules made the High Court rather a transmitting authority and the power of selection really lay with the selection committee constituted under the rules framed by the Governor under Article 309. It may be mentioned that three of the officers selected were not members of the judicial service but were considered to be judicial officers being members of the executive discharging revenue and magisterial duties of judicial nature. It was in this context that reference was made to independence of the judiciary and an observation made by their Lordships that a rule permitting recruitment from an executive

department would be violative of Article 233 (2) as the expression "the service" as used therein means only the judicial service. This case is thus of no assistance.

(42) *Sudhansu Sekhar Misra's case* (10) also relates to the question of control by way of transfer of a District Judge. Some judicial officers were posted to the Secretariat in the Law Department of the State Government. The High Court later wanted to withdraw those officers and substitute them by others. The State Government resisted this transfer and insisted on retaining those already posted in the Secretariat. It was in these circumstances that their Lordships took the view that if the services of those officers in the Secretariat had not been placed at the disposal of the Government for any definite period, it was open to the High Court to recall them and post them as presiding officers of the district Courts, but it was equally observed that it was beyond the powers of the High Court to post other officers in the Secretariat. Articles 233 and 235 fell for consideration in this context. A reference was made to *Nripendra Nath Bagchi's case* (5) (supra) which, it is contended, gave all sorts of administrative control over judicial officers to the High Court. Hegde J., who delivered the judgment of the Court examined the true impact of the decision in *Bagchi's case* (5), and recorded a note of caution. *Relying on Quinn* v. *Leathem* (14), it was observed that "a decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It is not a profitable task to extract a sentence here and there from a judgment and to build upon it". While considering the ratio of the decision, his Lordship observed as follows :—

> "......... this Court laid down that the word 'control' found in Article 235 includes disciplinary jurisdiction as well. The only question that fell for decision in that case was whether the government of West Bengal was competent to institute disciplinary proceedings against an additional district and sessions Judge. This Court upheld the decison of the High Court of Calcutta holding that it had no such jurisdiction. That was the single question decided in that case. It is true that in the course of the judgment, this Court observed that the High Court is made the sole custodian of the

(14) 1901 A.C. 495.

control of the judiciary, but that observation was made in the context of the question that arose for decision."

Ranga Muhammad's case (6) was also examined and his Lordship observed that the sole point that arose for decision in that case was as to who was the authority to transfer a District Judge, the State Government or the High Court. The rule laid down in that case was held to be of no assistance in determining the question as to whether the High Court has the power to fill up some of the posts in the Secretariat it being observed that—

> "Just as the executive cannot know the requirements of a particular court, the High Court also cannot know the requirements of any post in the secretariat. Just as the High Court resents any interference by the executive in the functioning of the judiciary, the executive has a right to ask the High Court not to interfere with its functions. It is for the executive to say whether a particular officer would meet its requirements or not. The High Court cannot, as contended by the learned Attorney-General, foist any officer on the government."

(43) There is thus no case decided by the Supreme Court which can be said to be directly in point. If the view canvassed for acceptance on behalf of the High Court is allowed to prevail and it is held that since control vests in it under Article 235, a proposal for the termination of the services of a judicial officer on his reaching the age of 55 years can be initiated by the High Court alone and that whatever it says in this regard is binding in law on the Governor will amount to completely changing the rules duly made under Article 309 relating to terms and conditions of service of judicial officers. The necessary corollary of such a view is that for the words "the Governor" and "the State Government", wherever they appear in connection with the termination of services of judicial officer, the "High Court" stands substituted and the latter's advice assumes the legal status of a mandate which must be accepted by the Governor, irrespective of the advice tendered to him by the Cabinet in this regard. The Governor, in such a situation, though an employer will be reduced to a subservient position not permitted to apply his mind independently on the advice of the Cabinet. Our Constitution and the rules as they exist at present do not visualise such a position. Keeping apart the propriety and expediency of

setting up or following a convention of accepting the advice of the High Court, it is difficult to hold that any such advice is legally binding on the Governor so as to issue a writ of *mandamus* directing him not to terminate the services of a judicial officer under rule 5.32. The High Court must, of course, be consulted as it exercises control over judicial officers, but it cannot be laid down as a rule of law that such consultation is binding. We find the expression "in consultation with" and "after consultation" appearing in Articles 233 and 234 and they have been construed by their Lordships of the Supreme Court in *Chandramouleshwar Prasad* v. *The Patna High Court and others* (9), wherein it is held that the underlying idea of consultation is only this much that "the Governor should make up his mind after there has been a deliberation with the High Court. The High Court is the body which is intimately familiar with the efficiency and quality of officers who are fit to be promoted as District Judges. The High Court alone knows their merits as also demerits. This does not mean that the Governor must accept whatever advice is given by the High Court . . ." A very instructive illustration with regard to consultation has been given by their Lordships in this case and I cannot do better than to reproduce the same:—

> "If the High Court recommends A while the Governor is of opinion that B's claim is superior to A's it is incumbent on the Governor to consult the High Court with regard to its proposal to appoint B and not A. If the Governor is to appoint B without getting views of the High Court about B's Claim vis-a-vis A's promotion, B's appointment cannot be said to be in compliance with Article 233 of the Constiution."

A consultation which is necessary because of the control vesting in the High Court cannot, therefore, be given a different meaning than it has under Article 233 or 234 nor can it be equated with a command or final decision.

(44) Hypothetical cases suggesting danger of wrong decisions by the Government are of no help in resolving the issue. For aught we know, the decision of the Government may in any case be more correct. In the instant case, it is not possible to say that the stand taken by the High Court was such that no other opinion could reasonably and *bona fide* be entertained. The work of the petitioner on civil side as Additional District Judge was found to be unsatisfactory and

while recommending his reversion to the substantive post of the Senior Subordinate Judge, in which post he was to do almost same type of civil work, a condition was laid down that his work shall be watched for six months and then a fresh recommendation made. The petitioner was beyond doubt reported to be honest but efficiency too had to be looked to. The Government might not have been wrong in relying on the instructions as contained in circular letter No. 477-3GS-(1)-64/15823, dated the 19th/21st May, 1964, referred to above, and insisting upon the High Court that it was not in public interest to retain the petitioner in service any longer as he was not likely to put his heart into work on reversion, more so when he had already reached the age of 55 years.

(45) The view of law I am taking is supported by a Full Bench judgment of the Kerala High Court reported as *N. Srinivasan* v. *State of Kerala* (8). Facts in that case are quite helpful. The State Government raised the age of superannuation of the members of the several State services except a few from 55 to 58 years,—*vide* G. O. (P) 376/66/Fin., dated the 12th August, 1966. The relevant rule 60 was accordingly amended. A note was appended to the rule which provided that an officer may after attaining the age of 55 years, voluntarily retire from service after giving three months' notice in writing to the appointing authority or the latter may also require the officer to retire on serving three months' notice without assigning any reason. This rule was made by the Governor under the proviso to Article 309 of the Constitution. Hardly a few months had passed when the Government changed and another order was passed reducing the age of superannuation from 58 years to 55 years. Rule 60(a) was again amended. Shri Srinivasan who was working as Additional District and Sessions Judge and was asked to retire under the reamended rule, filed along with another officer a petition in the High Court of Kerala under Article 226 of the Constitution, challenging the validity of the re-amended rule reducing the age of superannuation from 58 years to 55 years. It was a common ground that under the amended rule he would have retired only on 6th April, 1970, but under the re-amended rule, he was to retire on 4th August, 1967. It appears that so far as judicial service was concerned, the age of superannuation was raised from 55 years to 58 years in consultation with and indeed at the instance of the High Court, but there was no such consultation when the rule was re-amended reducing the age of superannuation to 55 years. An argument based on Article 235, as interpreted by their Lordships in *Nripendra Nath*

Bagchi's case (5) was advanced before the High Court on behalf of the petitioners it being contended that compulsory retirement of members of the judicial service could be ordered only after consultation with the High Court and the re-amendment of the rule so far as judicial officers were concerned was, therefore, bad in law. In repelling the argument, it was observed in the majority judgment that failure to consult the High Court which occupied special position in relation to members of judicial service of the State under provisions of Chapter VI of Part VI of the Constitution was a matter of administrative impropriety but involved no breach of Articles 233 to 235. A few observations from the majority judgment need to be reproduced hereunder:—

> "The object of these articles is no doubt to safeguard the independence of the judiciary but we cannot pursue that object beyond where the articles (spurring their language to its widest possible meaning in furtherance of their object) will take us. Nor can we conceive of a Government functioning within the Constitution so abusing his power to reduce the age of superannuation as to make it a weapon for securing the subjection of the judiciary. And should there be such abuse the sanction would lie elsewhere mere consultation with the High Court with no obligation to follow its advice would hardly be an effective curb."

Another argument put forward was that by reason of the rule of construction embodied in section 16 of the General Clauses Act, 1897, compulsory retirement of members of the judicial service could be ordered only after such consultation as retirement fell within the realm of appointments for which consultation with the High Court was necessary under articles 233 and 234. To this the answer of the learned Judges is that "even assuming that compulsory retirement on superannuation would amount to a dismissal within the meaning of the section, the section does not require that the power to order compulsory retirement shall be exercised in the same manner and subject to the same conditions or restrictions as the power to appoint under Article 233 or 234." Articles 233 and 234 were held to operate with respect to appointments to judicial service and neither Article, in the opinion of the learned Judges, has anything to do with the conditions of the service after appointment and the age of superannuation or tenure of a civil servant according to

them, is a condition of service. An observation in this regard is in the following words :—

> "It is true that 'control over district Courts and courts subordinate thereto' implies some measure of control over the persons manning these courts and that matters like disciplinary control and the power to transfer are included in the word 'control' as used in the Article. See *State of W.B.* v. *Nripendra Nath* (5), and *State of Assam* v. *Ranga Muhammad* (6). But the tenure of a civil servant is undoubtedly a condition of his service : See *State of U.P. v. Babu Ram* (15), paragraph 13, and it is not easy to understand how fixing the age of superannuation of a person can be regarded as a measure of control over him."

Isaac J. took a different view to which it is not necessary to refer for the purposes of the present writ petition and suffice to quote a few of his pertinent observations which support the view I am taking. The learned Judge observed :

> "The Sureme Court held that the power of transfer of members of the judicial service from one station to another is a matter relating to "control" and that under Article 235 of the Constitution, the said power vests wholly in the High Court subject only to the limitations contained in the said Article. But these decisions do not render any assistance for the contention raised by the petitioner's learned counsel. The power of termination of service falls, according to me, in the realm of the power of appointment. The 'control' vested in the High Court under Article 235 relates only to the period during which the member of the judicial service holds office. I am, therefore, unable to accept the contention that 'control' over the members of the judicial service vested in the High Court under Article 235 of the Constitution includes also the power to terminate their service."

(46) Now coming to the charge of *mala fides,* the petitioner has made the same recklessly without appreciating that being a judicial officer he should have acted judiciously. All that is alleged by

(15) A.I.R. 1961 S.C. 751.

him is that on 19th August, 1970, when the trial of a criminal case registered under sections 330/342, Indian Penal Code, against one Shri Narinder Singh Lamba, a cousin of respondent 3 and others was to open, an application was made by the Public Prosecutor under section 494, Criminal Procedure Code, for withdrawal of the prosecution, but he declined the request of the State. The averment further is that respondent 3 got annoyed and it is on account of such annoyance that the notice of termination of services has been served on the petitioner ignoring the recommendation of the High Court that he be retained in service after attaining the age of 55 years. There is nothing to show that the District Magistrate who authorised the Public Prosecutor to withdraw the case acted at the instance of respondent 3. Whatever may be the suspicion lurking in the mind of the petitioner, no amount of suspicion can take the place of proof. The District Magistrate in his letter, Annexure R/1, gave some reasons and the Public Prosecutor acted on the same. The trial of the case had already been delayed for three years and the District Magistrate was of the view that there was no evidence. Respondent 3 had denied the allegations made against him and in the absence of any evidence direct or circumstantial, to the contrary there is no reason to doubt his statement. Tuli J., has elaborately dealt with the matter and it is futile to tread the same ground over again except that I cannot resist observing that such an indiscreet act was not expected of the petitioner. As already observed, there could be two views about the propriety or desirability of retaining the petitioner any more in service as having been reverted from a higher post, he is bound to feel disgruntled and the likelihood of his not applying mind to work could not be ruled out. The State Government acted on the basis of instructions issued in this behalf and no question of *mala fides* arises.

(47) For the foregoing reasons, I must hold that the notice (Annexure 'A') served by the State Government on the petitioner terminating his services suffers from no legal infirmities as it was within the jurisdiction of the State Government to issue such a notice under rule 5.32 of the Punjab Civil Service Rules, Volume II. In the result, the writ petition stands dismissed with no order as to costs.

D. K. MAHAJAN, J.—(48) I have gone through the judgments prepared by my learned brothers, H. R. Sodhi and B. R. Tuli, JJ. I regret my inability to agree with the judgment prepared by

H. R. Sodhi, J. It is significant that Sodhi, J., has not differed from Tuli J., so far as the principles governing such cases are concerned. He has merely differed on the question of the interpretation of the Constitution. So far as the interpretation of the Constitution is concerned, the Supreme Court decisions, relied upon by Tuli J., are clear, and for this reason, I entirely agree with the opinion of my learned brother Tuli J.

ORDER OF THE FULL BENCH

(49) In view of the majority decision, this petition is allowed. The notice issued on August 20, 1971, by the Haryana Government, retiring the petitioner from service, is quashed. There will be no order as to costs.

K. S. K.

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