FULL BENCH

Before A. D. Koshal, S. S. Sandhawalia and D. S. Tewatia, JJ.

STATE OF PUNJAB,—*Appellant.*

versus

OM PARKASH DHARWAL AND ANOTHER,—*Respondents.*

Criminal Appeal No. 1212 of 1970.

March 17, 1972.

Constitution of India (1950)—*Articles* 154, 166, 233, 234 *and* 311—*Word "Governor" in the Articles* 233 *and* 234—*Whether connotes the Governor acting "in his individual capacity", untrammled by the advice of the Council of Ministers—Appointments to judicial services of the State—Whether an executive function—Governor making such appointments—Whether acts in his individual capacity—Punjab Civil Services (Judicial Branch) Rules,* 1951—*Rules* 1 *and* 7—*Whether* ultra vires *Articles* 234 *and* 311 *of the Constitution—Prevention of Corruption Act (II of* 1947)—*Section* 6(1)(b)—*Sanction for prosecution of a judicial officer of the State, given by the State Government and not by the Governor in his individual capacity—Whether* valid.

Held, (per majority Sandhawalia and Tewatia, JJ., Koshal, J., Contra.), that it is unwarranted to introduce the words "in his discretion" or "in his individual capacity" into either Article 233 or Article 234 of the Constitution. The language used in both the Articles is "Governor of the State" and no surplusage to that word can be added by implication or by a method of strained construction. The Constitution itself has in terms expressly provided whether the Governor has to exercise any of his functions in his discretion. By necessary implication, the other functions of the Governor are to be discharged by him with the aid and advice of his Council of Ministers. Hence the word "Governor" in Articles 233 and 234 cannot be read as "Governor in his individual discretion" or "Governor in his individual judgment".

(Paras 52, 53 and 74)

Held, that all State functions which do not fall within the ambit of either being legislative or judicial fall in the residuary class of the executive functions. Appointments to judicial service is neither legislative nor a judicial function. It thus necessarily is an executive function. Hence the appointments to the judicial service of a State under Articles 233 and 234 of the Constitution are plainly the exercise of the executive power of the Governor. These Articles provide a mode or the manner of the exercise of such power. The Governor acts only in his capacity as the formal head of the executive of the State. He does not act therein in his individual judgment. (Para 74)

Held, that rules 1 and 7 of the Punjab Civil Service (Judicial Branch) Rules, 1951, are valid and constitutional having been duly and legally promulgated under Article 234 of the Constitution.

(Para 82)

Held, that the sanction for prosecution of a judicial officer of the State given by the State Government and not by the Governor in his individual capacity, emanates from an authority legally competent to grant the same under section 6(1)(b) of Prevention of Corruption Act is valid and legal.

(Para 83)

Held, (per Koshal, J. Contra.) that it is true that Articles 233 and 234 do not expressly state that the power of appointment conferred by them on the Governor is to be exercised by him "in his discretion", but if the scheme of the Constitution is borne in mind, these Articles must be interpreted to mean that the said power is to be so exercised. That scheme is such that various powers have been conferred on the President of India and Governors of States to be exercised by them respectively in their individual capacities and not as the repositories of the executive powers even though the Constitution does not say in so many words that those powers are to be so exercised. The appointing authority under Articles 233 and 234, therefore, must be taken to be the Governor in his individual capacity and not as representing the State Government. (Paras 11 and 23)

Held, that Articles 233 and 234 of the Constitution provide for the power of appointment of district judges and judicial officers subordinate to them vesting in the Governor. If these Articles had not made a special provision that such appointments shall be made by the Governor of the State, the executive power of the State could have included the power to appoint district judges and judicial officers subordinate to them. As that power is excluded by Articles 233 and 234 from the sphere of the executive power of a State, it is, therefore, not a power to which the provisions of Articles 154 and 156 are applicable. The Constitution makes a distinction between the executive powers of the State which vest in the Governors but which are liable to be exercised by them either directly or through subordinates. Articles 233 and 234 clearly deal with powers of the latter type. A power which is vested by the Constitution in the Governor of a State has to be exercised by him personally and cannot be delegated to any person. The power of appointment of judicial officers vesting in the Governor cannot, therefore, be delegated and while making the appointments, the Governor acts in his individual capacity.

(Paras 10, 17 and 29)

Held, that rules 1 and 7 in Part D of the Punjab Civil Service (Judicial Branch) Rules, 1951, envisage the power of appointment of persons other

than district judges to the State Judicial Service to lie in the State Government who is further empowered by the provisions of Part F of those rules to remove such persons from office. These rules to that extent are *ultra vires* Articles 234 and 311 of Constitution inasmuch as the powers of appointment and removal of such persons, are vested by the Constitution in the Governor in his individual capacity and he cannot delegate them to any other authority. (Para 30)

Held, that the State Government has no power to remove a judicial officer from service and is, therefore, not the authority competent to grant sanction for his prosecution under clause (b) of sub-section (1) of section 6 of Prevention of Corruption Act. The authority so competent is the Governor of the State acting in his individual capacity.

(Para 31)

Case referred by the Division Bench of this Hon'ble High Court consisting of Hon'ble Mr. Justice A. D. Koshal and Hon'ble Mr. Justice D. S. Tewatia,—vide *order dated 18th May, 1971 to a Full Bench. The Full Bench consisting of Hon'ble Mr. Justice A. D. Koshal, Hon'ble Mr. Justice S. S. Sandhawalia, and Hon'ble Mr. Justice D. S. Tewatia, remanded the case to the trial Court for decision on merits and in accordance with law,*—vide *order dated 17th March, 1972.*

Appeal from the order of Shri Asa Singh Gill, Special Judge, Gurdaspur, dated 20th July, 1970, acquitting the respondents.

P. S. MANN, ADVOCATE, FOR ADVOCATE-GENERAL, PUNJAB, for the appellant.

ANAND SWAROOP, SENIOR ADVOCATE WITH R. S. MITTAL, & I. S. BALHARA, ADVOCATES, for the respondents.

ORDER OF THE FULL BENCH

Koshal, J.—(1) This appeal filed by the State of Punjab against the judgment of Shri Asa Singh Gill, Special Judge, Gurdaspur, dated the 20th of July, 1970, holding the trial of respondent No. 1 for offences under section 5(2) of the Prevention of Corruption Act (hereinafter referred to as the Act) and section 161 of the Indian Penal Code, and of respondent No. 2 under section 165-A of the Indian Penal Code, conducted by him, to be without jurisdiction and, therefore, null and void, has been entrusted for decision to a Full Bench in pursuance of the order of reference dated the 18th of May, 1971, made by a Division Bench consisting of my learned brother Tewatia, J., and myself, and the sole question requiring

determination therein is whether the sanction for prosecution of respondent No. 1 purporting to have been given by the State Government under section 6 of the Act was or was not validly accorded.

(2) The facts leading to this appeal may be briefly stated. Respondent No. 1 is a member of the Punjab Civil Service (Judicial Branch) and was holding the post of Subordinate Judge-cum-Judicial Magistrate 1st Class, Batala, on the 27th of October, 1968. It is alleged by the appellant State that on that date he accepted, through respondent No. 2, a sum of Rs. 200 in cash and a bottle of whisky as illegal gratification from one Jawand Singh who was a person accused of a criminal offence in a case pending in his (respondent No. 1's) Court. On the 1st of August, 1969, the State Government, purporting to act in pursuance of the provisions of sub-section (1) of section 6 of the Act, passed an order sanctioning the prosecution of respondent No. 1. That order is expressly made in the name of the Governor of Punjab and is signed by Shri A. N. Kashyap, Chief Secretary to Government, Punjab. It is common ground between the parties that the order was issued by the Government in the exercise of its executive functions and not personally by the Governor to whom the file of the case was never submitted before sanction for prosecution was accorded.

(3) During the course of the trial of the respondents 14 witnesses were examined on behalf of the prosecution and 27 in defence. At the argument stage it was contended before the learned trial Judge on behalf of the respondents that it was the Governor of Punjab acting in his individual capacity who was competent to remove respondent No. 1 from service, he being the appointing authority in the case of respondent No. 1 under Article 234 of the Constitution of India and that he (the Governor) alone could sanction the prosecution of respondent No. 1 in view of the provisions of section 6 of the Act. Reliance on behalf of the respondents was placed in this connection on *Murari Lal Puri* v. *The State of Punjab*, (1), decided by a Division Bench of this Court consisting of Harbans Singh and Mahajan, JJ. In that case the sanction for prosecution under section 5(2) of the Act of Shri Murari Lal Puri, a District and Sessions Judge, was accorded by the Haryana State Government when the State was under the President's rule. The order granting

(1) Cr. A No. 1180 of 1968 decided on 18th May, 1970.

sanction was passed by the Chief Secretary to Government, Haryana, and was never placed before the Governor of Haryana or the President of India. It was argued on behalf of the State that under Article 233 of the Constitution the power of appointment of district judges was vested in the "Governor of the State" by which expression was meant the Governor of the State exercising the executive functions of the State Government, that the State Government was, therefore, the appointing authority in the case of district judges and was also consequently vested with the power of their removal so that it was the authority competent to accord sanction for the prosecution of Shri Murari Lal Puri. The argument was repelled by the Division Bench and it was held that by the expression "Governor of the State" occurring in Article 233 of the Constitution is meant the Governor of the State acting in exercise of the powers vested in him personally by the Constitution, and not the Governor of the State acting in the exercise of the executive functions of the State Government. The sanction accorded by the State of Haryana was accordingly found to be invalid.

(4) Following *Murari Lal Puri's case*, (1), (supra) the learned trial Judge held that the expression "Governor of the State" occurring in Article 234 which relates to the appointment of persons, other than district judges, to the judicial service of a State, had the same meaning as it had in Article 233. On behalf of the appellant State reliance was placed before him on *State of Punjab* v. *Shamsher Singh*, (2), a case decided by another Division Bench of this Court consisting of Mahajan and Dhillon, JJ., which lays down that on a correct interpretation of Article 234 the removal by the State Government of a probationer Subordinate Judge from service is legal. That interpretation is solely based on *Mohammad Ghouse* v. *The State of Andhra*, (3) wherein the facts were these. Certain serious charges were levelled against Mohammad Ghouse, who was a member of the Madras Provincial Judicial Service. One of the Judges of the High Court of Madras, Balakrishna Ayyar, J., was deputed to enquire into those charges and after holding the necessary enquiry expressed the opinion that Mohammad Ghouse should be dismissed or removed from service. The High Court approved of

(2) 1970 P.L.R. 841.

(3) A.I.R. 1957 S.C. 246.

this opinion and passed an order suspending Mohammad Ghouse until further orders. The report was then sent for action to the Andhra State Government who issued a notice to Mohammad Ghouse to show cause why he should not be dismissed or removed from service. Mohammad Ghouse filed a petition under Article 226 of the Constitutuion for a writ quashing the order of his suspension on two grounds one of which was that the said order was void as it ~~who alone could remove him from~~ service so that the order of the authority which appointed him was the Governor of the State who alone could remove him from service so that the order of suspension made by the High Court was bad. This ground was repelled by the High Court and again in appeal by their Lordships of the Supreme Court who observed :

> "The report was then sent to the Government for action, and, in fact, the Andhra Government has issued a notice to the appellant on August 12, 1954, to show cause why he should not be dismissed or removed from service. Thus, it is the appropriate authority *under Article* 311 *that proposes to take action against the appellant, and it is for that authority to pass the ultimate order in the matter.* The order passed by the High Court on January 28, 1954, is merely one of suspension, pending final orders by the Government, and such an order is neither one of dismissal or of removal from service within Article 311 of the Constitution."

(5) That part of the above observations which we have underlined (Italics in this report) was considered by the Division Bench deciding *Shamsher Singh's case* (2), to mean that the removal from office of a member of the State's judicial service was a matter within the competence of the State Government as opposed to the Governor in his individual capacity.

(6) The learned trial Judge gave preference to the dictum in *Murari Lal Puri's case* (1), on the ground that the former was "a direct authority on the point". Consequently he held in the impugned judgment that the sanction to prosecute respondent No. 1 having been given by the State Government, which was not the authority competent to give it, was invalid so that the entire trial was without jurisdiction and, therefore, null and void.

(7) When this case came up for hearing in the first instance before the Division Bench consisting of my learned brother Tewatia, J., and myself, reliance was again placed on behalf of the appellant State on the dictum in *Shamsher Singh's case* (2), which we thought was an authority directly in point but the correctness of which we doubted. It was in view of the conflict between the decision in that case and the one in *Murari Lal Puri's case* (1), that we referred the instant case for decision to a larger Bench.

(8) In order to appreciate the points raised before us it is necessary to set down here the provisions contained in clause (1) of Article 154, Article 162, Article 166, clause (1) of Article 233, Article 234, Article 235, Article 310, clause (1) of Article 311 and entry 3 of List II in the Seventh Schedule to the Constitution of India, of sub-section (1) of section 6 of the Act and of clause (c) of sub section (60) of section 3 and section 16 of the General Clauses Act (Central Act No. 10 of 1897) :

Articles of the Constitution of India.

"154. (1) The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution."

"162. Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws :

"Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

"166. (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

"(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such

manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

"(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion."

"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."

"234. Appintment 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."

310. (1) Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the

President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State.

"(2) Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President, or, as the case may be, of the Governor of the State, any contract under which a person, not being a member of a defence service or of an all-India service or of a civil service of the Union or a State, is appointed under this Constitution to hold such a post may, if the President or the Governor, as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post."

"311. (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed."

Entry 3 *above mentioned.*

"3. Administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Court, officers and servants of the High Court; procedure in rent and revenue courts; fees taken in all courts except the Supreme Court."

The Act.

"6. (1) No court shall take cognizance of an offence punishable under section 161 or section 164 or section 165 of the Indian Penal Code, or under sub-section (2) of section 5 of this Act, alleged to have been committed by a public servant, except with the previous sanction,

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable

from his office save by or with the sanction of the Central Government, of the Central Government.

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of the State Government;

(c) in the case of any other person, of the authority competent to remove him from his office."

The General Clauses Act.

"3. In this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context,—

* * * * *

* * * * *

(60) 'State Government' ,—

* * * * *

* * * * *

(c) as respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a State, the Governor, and in a Union Territory, the Central Government :

and shall, in relation to functions entrusted under Article 258-A of the Constitution to the Government of India, include the Central Government acting within the scope of the authority given to it under that article:"

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

(9) The contentions raised before us on behalf of the appellant State may now be set down. They are :

(1) Under entry 3 above extracted, the administration of justice and the constitution and organisation of all courts except the Supreme Court and the High Court, are matters with respect to which the Legislature of the State has power to make laws. To those matters, Article 162 extends the executive power of the State. Constitution of courts includes the appointment of their presiding officers so that the executive power of the State extends to the appointments mentioned in Articles 233 and 234 and the same is vested under Article 154 in the Governor who is authorised to exercise it either directly or through officers subordinate to him. Further, the Governor has made rules called the "Rules of Business of the Government of Punjab" and "Business of the Punjab Government (Allocation) Rules, 1969" (hereinafter collectively called the Rules of Business) in exercise of his powers under clauses (2) and (3) of Article 166, and the sanction to prosecute respondent No. 1 is in accordance therewith as well as with clause (1) of Article 166. This view is supported by *Mohammad Ghouse's* case (3) (supra) and *Shamsher Singh's case* (2) (supra).

(2) According to clause (c) of sub-section (60) of section 3 of the General Clauses Act, the expression "State Government" means the "Governor" so that the expression "Governor of the State" occurring in Articles 233 and 234 means the State Government and nothing else.

(3) The power of removal of a public servant is not co-extensive with the power of appointment. Even if the power of appointment of judicial officers be held to have been conferred by the Constitution on the Governor personally, the power of removing them from office has not been so conferred on him and forms part of the general executive power of the State Government who was, therefore, competent to sanction the prosecution of respondent No. 1 in accordance with the provisions of clause (b) of sub-section (1) of section 6 of the Act.

(4) The Rules of Business have been framed by the Governor under clauses (2) and (3) of Article 166 and entrust his executive power in the matter of administration of justice to one of his Ministers who cannot be said to be an authority subordinate to the Governor. Under Article 311 the bar against removal of a public officer operates only against an authority subordinate to the appointing authority so that an authority equal or superior in rank to the appointing authority has the power of removal. The Minister of Justice not being an authority subordinate to the Governor must be regarded as an equal authority and, therefore, as one competent to remove respondent No. 1 from office. The sanction accorded in pursuance of his orders is, therefore, valid.

(5) Appointment of judicial officers under Article 234 has to be made by the Governor "in accordance with the rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court * * *". Rule 1 and sub-rule (1) of rule 7 appearing in Part D of the Punjab Civil Service (Judicial Branch) Rules, 1951, which have been framed by the Governor of Punjab in exercise of the powers conferred by Article 234 read with the proviso to Article 309 envisage appointments of persons other than district judges to the judicial service of the State by the State Government and not by the Governor as such. Further, the solitary rule appearing in Part F of those Rules, read with Appendices A and B thereto, specifies the State Government as the authority competent to remove such persons from office. Those Rules are binding on the Governor who has himself conferred the powers of appointment and removal on the State Government by virtue of the provisions of Article 234 of the Constitution. The State Government is, therefore, legally clothed with the power of removal.

I shall proceed to consider these contentions seriatim.

(10) Though attractive at first sight, contention (1) is really without substance. If the executive power of a State had been extended by Article 162 to all matters

with respect to which the Legislature of the State has power to make laws, the contention would be unexceptionable; but the provisions of Article 162 are expressly made subject to the other provisions of the Constitution and Articles 233 and 234 clearly provide for the power of appointment of district judges and judicial officers subordinate to them, vesting in the Governor. If the two Articles last mentioned had not made a special provision that such appointments shall be made by the Governor of the State, the executive power of the State would have included the power to appoint district judges and judicial officers subordinate to them. As it is, that power is excluded by Articles 233 and 234 from the sphere of the executive power of a State and is not, therefore, a power to which the provisions of Articles 154 and 166 are applicable. The Rules of Business which have been framed by the Governor under Clauses (2) and (3) of Article 166 also cannot govern the appointments made under Articles 233 and 234 for the same reason.

(11) It is true that Articles 233 and 234 do not expressly state that the power of appointments conferred by them on the Governor is to be exercised by him "in his discretion", but if the scheme of the Constitution is borne in mind, those Articles must be interpreted to mean that the said power is to be so exercised. That scheme is such that various powers have been conferred on the President of India and the Governors of States to be exercised by them respectively in their individual capacities and not as the repositories of the executive powers (of the Union or the States, as the case may be) even though the Constitution does not say in so many words that those powers are to be so exercised. Quite a few authorities are available in support of this view and may be noticed here.

(12) In *State of Uttar Pradesh and others* v. *Babu Ram Upadhya*, (4), the question was whether or not the power of the Governor to terminate the service of a public servant at pleasure under Article 310 was a part of the executive power of the State. Their Lordships held that a State Legislature had no power to make laws affecting the tenure of a public servant at the pleasure of the Governor, and that in any case Article 310 constituted a provision subject to which Article 162 must be read so that the power conferred on the Governor under Article 310 fell outside the scope of Article 154.

(4) A.I.R. 1961 S.C. 751=(1961)2 S.C.R. 679.

(13) In *Moti Ram Deka and others* v. *General Manager, North East Frontier Railway and others,* (5) the same view was reiterated.

(14) In *Jayantilal Amratlal Shodhan* v. *F. N. Rana and others,* (6), one of the questions that arose for decision was about the field in which clause (1) of Article 258 of the Constitution operates. That clause authorises the President of India to entrust either conditionally or unconditionally functions in relation to any matter to which the executive power of the Union extends, to a State Government or to its officers, with the consent of the State Government. Discussing the scope of that clause, their Lordships observed :

> "That clause enables the President to entrust to the State the functions which are vested in the Union, and which are exercisable by the President on behalf of the Union; it does not authorise the President to entrust to any other person or body the powers and functions with which he is by the express provisions of the Constitution as President invested. The power to promulgate Ordinances under Article 123; to suspend the provisions of Aricles 268 to 279 during an emergency; to declare failure of the constitutional machinery in States under Article 356; to declare a financial emergency under Article 360; to make rules regulating the recruitment and conditions of service of persons appointed to posts and services in connection with the affairs of the Union under Article 309—to enumerate a few out of the various powers—are not powers of the Union Government; these are powers vested in the President by the Constitution and are incapable of being delegated or entrusted to any other body or authority under Article 258(1). The plea that the very nature of these powers is such that they could not be intended to be entrusted under Article 258(1) to the State or officers of the State, and, therefore, that clause must have a limited content, proceeds upon an obvious fallacy. Those powers cannot be delegated under

(5) A.I.R. 1964 S.C. 600.
(6) A.I.R. 1964 S.C. 648.

Article 258(1) because they are not the powers of the Union, and not because of their special character. There is a vast array of other powers exercisable by the President—to mention only a few—appointment of Judges : Articles 124 and 217, appointment of Committees of Official Languages Act : Article 344, appointment of Commissions to investigate conditions of backward classes : Article 340, appointment of Special Officer for Scheduled Castes and Tribes : Article 338, exercise of his pleasure to terminate employment : Article 310, declaration that in the interest of the security of the State it is not expedient to give to a public servant sought to be dismissed an opportunity contemplated by Article 311(2)—these are executive powers of the President and may not be delegated or entrusted to another body or officer because they do not fall within Article 258."

(15) Following *Babu Ram Upadhya's case,* (4) (supra) and *Jayantilal's case* (6), (supra) a Division Bench of this Court consisting of Mehar Singh, C.J., and Narula, J., held in *Rao Birinder Singh* v. *The Union of India and others;* (7); that the function of the President of India under Article 356 of the Constitution was not part of the executive power of the Union referred to in Articles 52, 73 and 77 and that it was a power conferred by the Constitution on the President to be exercised by himself.

(16) In *Jyoti Prakash Mitter* v. *Hon'ble Mr. Justice Himansu Kumar Bose,* (8), it was held that clause (3) of Article 217 of the Constitution vests the jurisdiction to determine the question about the age of a Judge exclusively in the President of India and that this function cannot be exercised by the Home Ministry in the name of the President. This view was reiterated by their Lordships in *Union of India* v. *Jyoti Prakash Mitter,* (9), with the following observations :

"It is necessary to observe that the President in whose name all executive functions of the Union are performed is by Article 217(3) invested with judicial power of great

(7) I.L.R. 1969 (I) Pb. & Hr. 176.

(8) A.I.R. 1965 S.C. 961.

(9) 1971 S.L.R. 203.

significance which has bearing on the independence of the judges of the higher Courts. The President is by Article 74 of the Constitution the constitutional head who acts on the advice of the Council of Ministers in the exercise of his functions. Having regard to the very grave consequences resulting from even the initiation of an enquiry relating to the age of a Judge, our Constitution makers have thought it necessary to invest the power in the President. In the exercise of this power if democratic institutions are to take root in our country, even the slightest suspicion or appearance of misuse of that power should be avoided. Otherwise independence of the judiciary is likely to be gravely imperilled. We recommend that even in the matter of serving notice and asking for representation from Judge of the High Court where a question as to his age is raised, the President's Secretariat should ordinarily be the channel, that the President should have consultation with the Chief Justice of India as required by the Constitution and that there must be no interposition of any other body or authority, in the consultation between the President and the Chief Justice of India. * * * * * *

* * * * * *

The President acting under Article 217(3) performs a judicial function of grave importance under the scheme of our Constitution. He cannot act on the advice of his Ministers. Notwithstanding the declared finality of the order of the President the court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on collateral considerations or the rules of natural justice were not observed, or that the President's judgment was coloured by the advice or representation made by the executive or it was founded on no evidence."

(17) It is thus quite clear that the Constitution makes a distinction between the executive powers of the Union and the States which vest in the President and the Governors respectively but which are liable to be exercised by them either directly or through subordinates, and the powers which are vested in them as President or Governors, respectively by the express provisions of the Constitution and which they must exercise themselves and not entrust to

any other person or body. Articles 233 and 234 clearly deal with powers of the latter type.

(18) The matter may be looked upon from another angle. The legislative history behind Articles 233 to 237 unmistakably points to the intention of the Constitution—makers to place the matter of appointment of judicial officers beyond the executive power exercised by the State Government. That history has been traced in detail in *The State of West Bengal and another* v. *Nripendra Nath Bagchi,* (10). After referring to the 1912 Report of the Islington Commission and the provisions of sub-section (2) of section 96-B and section 107 of the Government of India Act, 1919, their Lordships pointed out that the powers of the High Court under that Act did not include the power of appointment, promotion, transfer or control of district Judges. Till then, according to their Lordships, the British Parliament was more concerned about Europeans than about the independence of the judiciary. They noted, however, that by the time the Government of India Act, 1935, was passed, things underwent a change and necessity for securing the independence of the judiciary was felt by the Joint Committee of Parliament from whose report their Lordships cited paragraph 337 which stated, *inter alia* :

> "We have been greatly impressed by the mischiefs which have resulted elsewhere from a system under which promotion from grade to grade in a judicial heirarchy is in the hands of a Minister exposed to pressure from members of a popularly elected Legislature. Nothing is more likely to sap the independence of a magistrate than the knowledge that his career depends upon the favour of a Minister; and recent examples (not in India) have shown very clearly the pressure which may be exerted upon a magistracy thus situated by men who are known, or believed, to have the means of bringing influence to bear upon a Minister. It is the Subordinate Judiciary in India who are brought most closely into contact with the people, and it is no less important, perhaps indeed even more important, that their independence should be placed beyond question than in the case of the superior Judges ....."

Their Lordships proceeded to say :

> "As a result, when the Government of India Act, 1935, was passed, it contained special provisions (sections 254-256

(10) A.I.R. 1966 S.C. 447.

already quoted) with regard to District Judges and the subordinate judiciary. It will be noticed that there was no immediate attempt to put the subordinate criminal magistracy under the High Court but the posting and promotion and grant of leave of persons belonging to subordinate Judicial service of a Province was put in the hands of High Court though there was right of appeal to any authority named in the rules and the High Courts were asked not to act except in accordance with the conditions of the service prescribed by the Rules. As regards the District Judges, the posting and promotions of a District Judge was to be made by the Governor of the Province exercising his individual Judgment and the High Court was to be consulted before a recommendation to the making of such an appointment was submitted to the Governor. Since section 240 of the Government of India Act, 1935, provided that a civil servant was not to be dismissed by an authority subordinate to that which appointed him, the Governor was also the dismissing authority. The Government of India Act, 1935, was silent about the control over the District Judge and the subordinate Judicial services. The administrative control of the High Court under section 224 over the courts subordinate to it extended only to the enumerated topics and to superintendence over them. The independence of the subordinate judiciary and of the District Judges was thus assured to a certain extent, but not quite.

"When the Constitution was being drafted the advance made by the 1935 Act was unfortunately lost sight of. The draft Constitution made no mention of the special provisions not even similar to those made by the Government of India Act, 1935, in respect of the subordinate judiciary. If that had remained, the judicial services would have come under part XIV dealing with the services in India. An amendment, fortunately, was accepted and led to the inclusion of Articles 233 to 237. These articles were not placed in the Chapter on services but immediately after the provisions in regard to the High Courts. The articles went a little further than the corresponding sections of the Government of India Act.

They vested the 'control' of the district courts and the courts subordinate thereto in the High Courts * * *."

(19) In a later part of the judgment their Lordships considered the scope of the word "control" appearing in Article 235 and while doing so remarked :

"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'."

(20) In *Chandra Mohan* v. *Sate of Uttar Pradesh and others,* (11) Articles 233 to 237 of the Constitution again came up for interpretation and their Lordships referred to their background in the following terms :

"But the makers of the Constitution also realised that 'it is the Subordinate Judiciary in India who are brought most closely into contact with the people, and it is no less important, perhaps indeed even more important, that their independence should be placed beyond question in the case of the superior Judges'. Presumably to secure the independence of the judiciary from the executive, the Constitution introduced a group of articles in Chapter VI of Part VI under the heading 'Subordinate Courts'. But at the time the Constitution was made, in most of the States the magistracy was under the direct control of the executive. Indeed it is common knowledge that in pre-independence India there was a strong agitation that the judiciary should be separated from the executive and that the agitation was based upon the assumption that unless they were separated, the independence of the judiciary at the lower levels

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

would be a mockery. So article 50 of the Directive Principles of policy states that the State shall take steps to separate the judiciary from the executive in the public services of the States. Simply stated, it means that there shall be a separate judicial service free from the executive control."

(21) *Bagchi's case* (10) (supra) and *Chandra Mohan's case* (11) (supra) were followed by Capoor and Narula, JJ., in *Manmohan Singh Tandon* v. *Shri Manmohan Singh Gujral*, (12). In that case the question arose whether it was the Governor in his individual capacity or the State Government who had the power to appoint a District Judge under Article 233. The Division Bench considered the legislative history of the provisions of Article 233 and also that behind the enactment of section 254 of the Government of India Act, 1935. *Bagchi's case* (10) (supra) and *Jayanti Lal's case* (6) (supra) were also taken into account and it was held that it is the Governor himself who is the appointing authority named in Article 233 and that the power of appointment cannot be performed by the State Government merely in the name of the Governor. This view was followed in *Murari Lal's case* (1) (supra) by Harbans Singh and Mahajan, JJ., who also noted the observations made by their Lordships of the Supreme Court in *Babu Ram Upadhya's case* (4) (supra) and *Chandra Mohan's case* (11) (supra).

(22) In *The State of Assam and another* v. *Kuseswar Saikia and others*, (13), their Lordships of the Supreme Court again observed :

"Chapter VI of Part VI of the Constitution deals with Subordinate Courts. The history of this Chapter and why judicial services came to be provided for separate from other services has been discussed in *State of West Bengal* v. *Nripendra Nath Bagchi*, (10). This service was provided for separately to make the office of a District Judge completely free of executive control."

(23) The points which emerge from these authorities may be shortly stated here. The provisions contained in Chapter VI of Part VI of the Constitution which deals with Courts subordinate to the High Court were taken out of those relating to civil services with a

(12) 1969 S.L.R. 194.

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

purpose and that purpose was that the members of the judicial service must be completely free of executive control and their independence ensured. The Chapter goes a little further than the corresponding sections of the Government of India Act, 1935 inasmuch as it vests the control over district courts and courts subordinate thereto in the High Court. It is clear that nothing of what was achieved by those sections was given up by the framers of the Constitution. The conclusion is that the appointing authority under Article 233 must be taken to be the Governor in his individual capacity and not as representing the State Government.

(24) If this be so, then I do not see why the expression "Governor of the State" should be construed to mean the Governor in his individual capacity when it occurs in Article 233 and to mean a very different thing, namely, the State Government, when it appears in Article 234. The cases just above considered do not envisage any such difference and, on the other hand, emphasise that the whole of Chapter VI of Part VI of the Constitution has a special purpose which is the independence of the judiciary. If the power to appoint district judges was given to the Governor acting in his individual capacity, there is no reason at all why the appointing authority in the case of judicial officers subordinate to the district judges should have been the State Government. If the appointment of district judges cannot be entrusted to Ministers, the rule would apply equally to the case of appointments of judicial officers subordinate to the district judges.

(25) Here I may take up a consideration of *Shamsher Singh's case* (2), (supra). As already pointed out, the Division Bench deciding that case purported to follow certain observations of their Lordships of the Supreme Court in *Mohammad Ghouse's case* (3), (supra) which, according to the Division Bench, meant that the removal from office of a member of the State Judicial Service was a matter within the competence of the State Government as opposed to the Governor in his individual capacity. In my view those observations do not lay down any such proposition. They were made solely in relation to a contention that it was the appointing authority mentioned in Article 234 (which was described before their Lordships as "Governor of the Province" and not the *High Court*) which had the power of removal of Mohammad Ghouse from office, and their Lordships held

that the High Court in suspending Mohammad Ghouse had not exercised any power of removal or dismissal which lay within the province of the appropriate authority. No argument was raised by either party before their Lordships that the order of removal or dismissal of Mohammad Ghouse from office could be exercised by the Governor as distinguised from the State Government or *vice-versa*, nor was there any occasion for such an argument being raised inasmuch as the case of Mohammad Ghouse was only at the suspension stage, and the observations of their Lordships must be deemed to be confined to the particular contention which was being dealt with.

(26) In the above view of the matter I have no hesitation in holding that *Shamsher Singh's case* (2) (supra), does not lay down the law correctly and that the appointing authority in Article 234 is the same as that in Article 233, namely, the Governor acting in his individual capacity and not the State Government. Contention (1), therefore, is repelled.

(27) There is no substance in contention (2) either. Clause (c) of sub-section (60) of section 3 of the General Clauses Act does lay down that "State Government" shall mean the Governor of the State but it does not further lay down that the converse is also true and that the Governor means the State Government. That clause, in my opinion, does not make a provision any different from what is laid down in clause (1) of Article 154 and clause (1) of Article 166 of the Constitution, the combined effect of which is that the executive power of the State shall be vested in the Governor and all executive actions of the Government of a State shall be expressed to be taken in the name of the Governor. The powers vested in the Governor by the Constitution itself are not the subject-matter, to any extent, of Article 154 and 166 or of clause (c) just above mentioned which, therefore, is of no help to the case of the appellant State.

(28) Contention (3) is also wihout force. Under section 16 of the General Clauses Act which is applicable to the interpretation of the Constitution the authority having for the time being power to make an appointment has also the power of his removal from office. As held by me above, it is the Governor personally in whom the power of appointment of judicial officers is vested under Articles 233 and 234. It is he, therefore, in whom also lies the power of removal of such officers from office. No principle of law or jurisprudence was cited

before us on behalf of the appellant State for the proposition that while the power of appointment was with the Governor personally, the power of removal must be deemed to lie with the State Government as part of its executive power. In fact, such a proposition would cut at the very root of the power of appointment vested in the Governor; for if it were accepted as correct, the State Government, by exercise of its power of removal, could render nugatory, if it so chose, every appointment made by the Governor—a result which could never have been intended by the Constitution-makers.

(29) Contention (4) has merely to be noticed to be rejected as untenable. As has been seen above, their Lordships of the Supreme Court have repeatedly taken the view that a power which is vested by the Constitution in the President or in the Governor of a State to be exercised by him personally cannot be delegated to any person. The power of appointment of judicial officers and that of their removal vests in the Governor of the State as already pointed out and not in the State Government. Neither of them can, therefore, be delegated. It is not correct to say that the Ministers functioning in a State are not officers subordinate to the Governor. Clause (1) of Article 154 states that the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Clause (3) of Article 166 is a supplementary provision authorising the Governor to make rules for the more convenient transaction of the business of the Government of the State and for the allocation among Ministers of the said business. It is under this provision that the Governor has framed the Rules of Business and when it is read with clause (1) of Article 154 it at once appears that the Ministers must be regarded as officers subordinate to the Governor. They cannot, therefore, remove from office a person who is appointed thereto by the Governor—a superior authority. Clause (1) of Article 311 is a bar to such removal.

(30) Contention (5) can also not be accepted as correct. Rules 1 and 7 in Part D of the Punjab Civil Service (Judicial Branch) Rules, 1951, no doubt envisage the power of appointment of persons other than district judges to the State Judicial Service to lie in the State Government who is further empowered by the provisions of Part F of those rules to remove such persons from office; but then to that extent they must be considered to be *ultra vires* Articles 234 and

311 of the Constitution inasmuch as the powers of appointment and removal of such persons, as already held, are vested by the Constitution in the Governor in his individual capacity and he cannot delegate them to any other authority, in view of the principle enunciated by their Lordships of the Supreme Court in *Babu Ram Upadhya's case* (4), (*supra*) and in *Jayantilal's case* (6) (*supra*) to the effect that the powers expressly conferred by the Constitution on the Governor or the President cannot be delegated or entrusted to any body or officer.

(31) I conclude that the State Government had no power to remove respondent No. 1 from service and was, therefore, not the authority competent to grant sanction for his prosecution under clause (b) of sub-section (1) of section 6 of the Act. I further hold that the authority so competent was the Governor of the State acting in his individual capacity and that the sanction not having been given by him is invalid. In the result, the appeal fails and is dismissed.

Sandhawalia, J.—(32) Issues of constitutional significance which have a bearing not only upon the independence of the subordinate judiciary, but also ultimately upon the basic concepts that underlie the parliamentary form of Government, fall for determination in this case which has been referred to this Full Bench. Rather unusually these issues arise from a criminal appeal. The relevant facts thereunder lie in a narrow compass and have been delineated in full by my learned brother Koshal, J. However, to maintain the homogeneity of this judgment, some reference to them becomes inevitable.

(33) Shri Om Parkash Dharwal, respondent No. 1 in this appeal filed by the State is a member of the Punjab Civil Service (Judicial Branch). At the relevant time he was holding the post of a Subordinate Judge 1st Class-cum-Judicial Mrgistrate 1st Class at Batala. It is the prosecution case that on the 27th of October, 1968, he accepted through respondent No. 2 Sardari Lal a sum of Rs. 200 in cash and a bottle of whisky as illegal gratification from one Jawand Singh, who was a person accused of a cirminal offence in his Court. It is also the prosecution case that Shri Dharwal, respondent No. 1, had earlier accepted illegal gratification in cash from numerous other persons in similar circumstances. A cirminal case against respondents Nos. 1

and 2 was registered and investigated and subsequently the prosecution sought the necessary sanction for launching the prosecution against respondent No. 1 as admittedly he was a public servant. On the 1st of August, 1969, the relevant sanction Exhibit P. X., the validity of which is primarily under issue was granted. This sanction was expressly made by the order and under the name of the Governor of Punjab and is signed by Shri A. N. Kashyap, the then Chief Secretary to the Government of Punjab.

(34) In the trial of the two respondents that followed, as many as 14 witnesses were examined on behalf of the prosecution and 27 were led in defence. However, an objection regarding the validity of the sanction was raised before the trial Court—Shri Asa Singh Gill, the Special Judge, Gurdaspur. The learned Judge to further probe the matter examined Shri Mohinder Singh Sodhi, Superintendent Services Branch, office of the Chief Secretary, Punjab, as a court witness. Mr. Sodhi deposed that the draft etc. of the sanction in due course was first forwarded to the Chief Secretary to Punjab. The Chief Secretary then forwarded it to the Chief Minister of Punjab, the incumbent of the office at the time being S. Gurnam Singh. The sanction was approved by the Chief Minister and returned to the Chief Secretary who then issued the sanction Exhibit P. X. duly signed by him. The witness further deposed that the papers relating to the sanction were never sent to the Governor of the Punjab for approval personally and these papers were never seen by him at any stage. These facts regarding the procedure adopted for the grant of sanction Exhibit P.X. are not in dispute and stand admitted on both sides.

(35) The learned trial Judge did not advert to the merits of the case but has adjudicated only upon the validity of the sanction Exhibit P.X. Relying on a Division Bench judgment of this Court in *Murari Lal Puri* v. *The State* (1), he took the view that the appointing authority of respondent No. 1 Shri Dharwal was the Governor and he alone consequently was competent to remove him from service and these, according to the learned Judge, were constitutional functions of the Governor which could not be performed by the State Government in the name of the Governor. He, therefore, held that sanction Exhibit P.X. having not been given by the Governor personally was for that reason not a valid one. On that view

he held that the trial of both the respondents was without jurisdiction and, therefore, null and void and directed the setting at liberty of the two accused persons forthwith.

(36) The State of Punjab then came up in appeal against the above-said order and the matter was first placed before my learned brothers Koshal and Tewatia, JJ., in a Division Bench. They noticed some apparent conflict between the two Division Bench authorities of this Court in *Murari Lal Puri's case* (1), and in *The State of Punjab* v. *Shamsher Singh* (2), and also in view of the important issues involved directed that the matter be placed before the Full Bench by their order of reference dated the 18th of May, 1971. As it is the validity or otherwise of the sanction for the prosecution of respondent No. 1 which is at issue, it is, therefore, both necessary and desirable at the very outset to set down the relevant portions of Exhibit P.X. which are in the following terms:—

"ORDER"

Whereas from the investigation conducted by the Police in case F.I.R. No. 202, dated the 27th October, 1968, Police Station, City Batala, district Gurdaspur, under sub-section (2), section 5 of the Prevention of Corruption Act, 1947, and sections 161 and 165-A of the Indian Penal Code, the Governor of Punjab is satisfied—

that Shri O. P. Dharwal, P.C.S., Judicial Magistrate, 1st Class, Batala, district Gurdaspur (under suspension), son of Shri Inder Singh, being a public servant by abusing his position as Judicial Magistrate, accepted or obtained for himself a sum of Rs. 200 and a bottle of 'Highland Chief' whisky and agreed to accept a remaining sum of Rs. 300 after acquittal, from Shri Jowand Singh, son of Shri Hira Singh, Jat, resident of village Chaura, Police Station Dera Baba Nanak, district Gurdaspur, through Shri Sardari Lal Nanda, son of Ganga Ram, resident of village Kelar Kalan, Police Station, Dhariwal, district Gurdaspur, as gratification other than legal remuneration, as a motive or reward for acquitting the aforesaid Shri Jowand Singh in case F.I.R. No. 40, dated the 15th March, 1968, under

sections 323/34, Indian Penal Code, Police Station Batala, then pending in his Court, * * * * * *

* * * * * * *

* * * * * * *

* * * * * * *

And whereas from the circumstances stated above, it appears that the aforesaid Shri O. P. Dharwal, P.C.S,, Judicial Magistrate, Batala (under suspension) has committed an offence of criminal misconduct as defined by clauses (a) and (b) of sub-section (1) of section 5 of the Prevention of Corruption Act, 1947, in the discharge of his duty, and under section 161 of the Indian Penal Code.

And whereas under clause (b) of sub-section (1) of section 6 of the Prevention of Corruption Act, 1947, no court can take cognizance of an offence punishable under section 5(2) of the Prevention of Corruption Act, 1947, (Act No. 2 of 1947) or section 161 of the Indian Penal Code, alleged to have been committed by a public servant who is not removable from the office save with the sanction of the State Government.

Now, therefore, in pursuance of the provisions of sub-section (1) of section 6 of the Prevention of Corruption Act, 1947, th Governor of Punjab hereby gives sanction to the prosecution of the aforesaid Shri O. P. Dharwal P.C.S. Judicial Magistrate, Batala, (under suspension) for the offences under sub-section (2) of section 5 of the Prevention of Corruption Act, 1947, and under section 161 of the Indian Penal Code.

By order and in the name of the Governor of Punjab.

(Sd.) A. N. KASHYAP,

Chief Secretary to Govt. Punjab."

Dated, Chandigarh :
1st August, 1969.

..

(37) In the arguments addressed before us on both the sides it is evident that the legality or otherwise of the above-quoted sanction

Exhibit P.X. would turn primarily upon the construction that may be placed on Article 234 of the Constitution of India, which is set down below for facility of reference:—

> "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."

The crucial question may now be posed forthwith and it is well formulated in the following terms.—

> "Does the word 'Governor' in the above-quoted Article 234 mean and connote the Governor acting in his individual capacity (or in his individual discretion) untrammled by the advice of the Council of Ministers?"

(38) With deference, and despite the great esteem in which I must hold the weighty opinion recorded in the affirmative by my learned brother Koshal J., (whose judgment I have the privilege to peruse) I feel bound to return an answer categorically in the negative to the above-said question.

(39) Now the basic argument on behalf of the respondents in support of the judgment under appeal which has been lucidly advanced by Mr. Mittal runs thus. Relying primarily on the legislative history of Articles 233 and 234 of the Constitution of India, which has been so admirably delineated by Hidayatullah J. in *the State of West Bengal and another* v. *Nripendra Nath Bagchi,* (10), Mr. Mittal raises an argument directed primarily to emotion rather than to logic. In substance it is contended that the appointment, dismissal and removal of the District Judges and the Subordinate judiciary should be taken out of the 'pressures and pulls' which inevitably form the content of political activity and to the inter-play of which an elected Council of Ministers must necessarily be responsive. The mode suggested to achieve this objective is to so construe the word 'Governe' in Article 234 so as to exclude altogether the State Council of Ministers and the Government from the ambit thereof to vest the power under the said Article wholly in the

individual discretion of the Governor alone. The argument is that the subordinate Judiciary must be excluded from the sphere of political pressure and be placed under the protective wings of the Governor acting either in his individual discretion or in his individual judgment. It is contended that in these matters of appointment, removal and dismissal of the subordinate judiciary, the Governor should not be bound by the advice of his cabinet (tainted as it must be by political pulls) and in fact should not even seek the same. It was commended to us that such an interpretation (even though it may strain to a breaking by the plain language of the Article) is conducive to the laudable object of promoting the independence of the subordinate judiciary.

(40) Building up on the above-said thesis, Mr. Mittal further contends that both the President and the Governor under our Constitution are invested with constitutional functions which both of them must exercise in their individual discretion and not upon the advice of their respective cabinets. Drawing mainly upon the analogy of the supposed constitutional functions of the President it is contended that under Article 234, the Governor also must exercise his power of appointment of the subordinate judiciary in his individual capacity or individual discretion.

(41) The above-said broad argument (its detailed ramifications will have to be noticed hereafter) raises larger issues which must be answered. The question at once arises whether the Governor of the State acting as the constitutional or the executive head of the State Government has any inherent powers which he could exercise in his individual discretion or individual judgment even where the Constitution does not in express terms empower him to do so ? Is the Governor generally and as a rule bound by the advice of his Council of Ministers, or can he override the advice of his cabinet or exclude it altogether in order to exercise supposedly inherent powers in his individual capacity or in the individual discretion ?

(42) I am afraid that except in cases where it is so expressly provided by the Constitution or by necessary intendment it has to be so, the Governor of the State cannot claim any powers which he may exercise in his individual capacity or in his individual discretion. Neither the language of the Constitution nor the legislative history of the relevant provisions can in my view support the theory of

inherent powers of individual discretion or individual judgment for the Governor under the present Constitution.

(43) The whole argument on behalf of the respondent in fact stems from the theory of the constitutional powers of the President and the observations made in that regard by their Lordships of the Supreme Court first in *State of U. P. & others* v. *Babu Ram Upadhya* (4), and then in *Jayantilal Amratlal Shodhan* v. *F. N. Rana and others* (6). It is only by way of analogy that it is argued from the above that the Governor at the State level also exercises similar constitutional powers and that he must exercise them in his individual discretion and further that Articles 233 and 234 are provisions whereunder he must exercise his powers in this manner. Because of this it is indeed necessary to examine the contention in its two-fold aspects. For clarity, therefore, it is inevitable to deal first with the so-called powers of the President which he is said to exercise in his individual discretion. Secondly, it remains to determine whether the Governor has identical and similar powers and whether Article 234 is the provision which attracts their exercise as such.

(44) I proceed, therefore, to first examine the contention that the President under the Constitution is vested with certain constitutional powers which he must exercise in his individual judgment or individual discretion. In order to understand the true nature of the functions exercised by the President as the constitutional head it is worthwhile first to examine the powers and functions conferred upon him by the Constitution in Chapter I of Part 5 thereof. Some reference to the history of constitutional development becomes inevitable but it will be burdening this judgment with inordinate lengths if it is attempted to trace the history of constitutional development in India and also the ancestory of the expressions 'individual judgment' and 'individual discretion' prior to 1935. It suffices, in my view, to mention the immediate predecessor of the present Constitution, namely, the Government of India Act 1935. Even a cursory reference to the said Act would make it evident that this statute had reserved considerable and wide functions to be discharged by the Governor-General in the exercise of his individual discretion or in the exercise of his individual judgment. The Governor-General was also vested with certain special responsibilities wherein also he was bound to act in one or the other of the above-said capacities. Without attempting to be exhaustive the Governor-General was empowered to act in his discretion under sections 9, 10, 14(1), 15, 17(5), 19, 20

and a host of other sections of the said Act. Similarly the Governor-General was to exercise his individual judgment under sections 12, 14(1), 16, 31(1), 42, 43 and a large number of other sections. A cursory perusal of the above-said sections as also of many others of the Government of India Act would show that very large areas of executive functions were excluded from the ambit of legislative and parliamentary control and vested in the personal discretion of the Governor-General. It is manifest, therefore, that the framers of the Constitution were not only well aware of these powers which were conferred on the Governor-General in his individual capacity but they were equally aware of the use and existence of these powers as a matter of history. It is not a secret that our Constitution has adopted a number of provisions of the Government of India Act almost verbatim and many other provisions of the Government of India Act provide the basic frame-work around which the new edifice of the Constitution was erected. The issue arises whether the founding fathers of the Constitution expressly wanted to retain these powers of individual judgment and individual discretion earlier vested in the Governor-General to be similarly continued in the office of the President under the new Constitution. The answer appears to me to be patently in the negative.

(45) The above-said result is first evident from the fact that so far as the functions of the President under the Constitution are concerned the framers of the same have not even at one place used the expressions individual discretion or individual judgment in regard to the President. Being well-aware of these powers vested in the preceding executive head of the Government, namely, the Governor-General under the Government of India Act, 1935, the exclusion of these expressions by the Constitution makers can lead only to one inference that our Constitution does not envisage any such concept as the individual discretion or individual judgment of the President as a rule. Despite the fact that the President is an elected head of the Union his functions have been modelled primarily on the British system of the Parliamentary Government in which the constitutional head, namely, the King is denuded of all actual powers. The whole scheme of the Constitution and in particular of Chapter I in Part 5 appears to be to vest the real power in the Council of Ministers whilst retaining the President only as a constitutional head and in fact as a figure-head. The real

executive is the Council of Ministers whilst the nominal executive is the President in whose name the real executive functions. This is even evident from a reference to Article 74(1) which expressly provides for a Council of Ministers with the Prime Minister as its head to aid and advise the President in the exercise of his functions. The sphere of this advice in fact extends virtually over the whole of the powers and the functions which the President exercises. Article 75 then lays down that the other Ministers of the Cabinet will be appointed by the President on the advice of the Prime Minister, By sub-clause (3) of Article 75 it is laid down that the Council of Ministers will be collectively responsible to the House of the people. These and the other relevant provisions of the Constitution leave no manner of doubt that the system adopted is the parliamentary system in which the real executive is the Council of Ministers which in turn is responsible to the elected legislature.

(46) Apart from the language of the statute (which it, however, must be said is not categorical), this matter becomes well highlighted by reference to the history of the Constitution to which it is legitimate to advert as has been laid down in the following terms in *Nripendra Nath Bagchi's case* (10) :—

> " * * * 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."

(47) A brief reference to the history of the Constitution making suffices the purpose. It is well-known, that originally the founding fathers had planned to follow the pattern of the Government of India Act by adopting or issuing a formal Instrument of Instructions to the President and the Governors. This scheme, however, was abandoned. Doubts were expressed in the Constituent Assembly whether the President would be bound by the advice of his Cabinet and whether he could override the same or act in his individual discretion or individual judgment. All such fears were scotched in categorical terms by Dr. Ambedkar, who as is well-known was one of the primary architects of the Constitution. The following reply which he gave to H. V. Kamath in the Constituent Assembly

will illustrate the accepted position of the Constitution on the point—

Shri H. V. Kamath :

Q. If in any particular case the President does not act upon the advice of his ministers, will that be tantamount to a violation of the Constitution and will he be liable to impeachment ?

A. *Hon'ble Dr. B. R. Ambedkar* : There is not the slightest doubt about it.

The view of Dr. Ambedkar, as has been well-noticed was equally shared by Krishnaswamy Ayyangar. Equally well-known it is that the late President Dr. Rajinder Prasad had once chosen to raise the issue whether the advice of the Cabinet was all pervasive in regard to the functions of the President in the context of the Hindu Code Bill and he was met with the firm opinion that as a rule the President acts only upon the advice of the Cabinet except whereby necessary intendment it is not possible to do so. Facing the firmness of these arguments backed as they were by the Constitutional precedents and the history Dr. Parshad did not press the issue and retreated from the position that the President had any powers of individual judgment or individual discretion.

(48) Equally clear is the view expressed by B. N. Rau in his authoritative work *India's Constitution in the making*. He has expressed himself clearly in the following terms on the powers of the President under the Constitution :—

"It is clear from Article 74(1) that it is the function of the Council of Ministers to advice the President over the whole of the Central field. *Nothing is left to his discretion or excepted from that field by this article.* By way of contrast, see—Article 163 which is the corresponding provision for Governors and which expressly excepts certain matters in which the Governor is, by or under the constitution, required to act in his discretion. *There is no such exception in the case of the President.*"

(49) Professor Alexandrowicz another noted authority in his well-known work '*Constitutional Development in India*' again has expressed an identical opinion. In the very opening of Chapter 7 of the above-said book he opined as follows :—

> "The provisions of Chapter I of Part V of the Constitution relating to the Executive convey *prima facie* the impression that the President of India, the Head of the State, is also the real head of the Executive, and the Ministry is only there to aid and to advise him in the exercise of his functions. However, a careful reading of the Constituent Assembly debates and the examinations of constitutional practice in the post-independence years *show beyond doubt that the position is exactly the reverse and that the President is by convention reduced to a mere figurehead while the Ministry is the real Executive.*"

(50) The above view of Professor Alexandrowicz is shared by an equally distinguished authority namely, Granville Austin in his illuminating book. *The Indian Constitution, Cornerstone of a Nation* (*Oxford* 1966) in Chapter 5 thereof.

(51) Apart from the above-said unanimous authoritative opinion on the point the observations by their Lordships of the Supreme Court in this context also tend to the same view. It must, however, be conceded that the point in terms has not been raised before them or adjudicated upon by them (had it been so, it would be unnecessary to examine it in principle). As early as in *Ram Jawaya Kapur and others* v. *The State of Punjab*, (14), their Lordships expressed the opinion that our Constitution, though federal in its structure, is modelled on the British Parliamentary system. They then proceeded to observe as follows :—

> "In India, as in England, the executive has to act subject to the control of the legislature; but in what way is this control exercised by the legislature ? Under Article 53(1) of our Constitution, the executive power of the Union is vested in the President but under Article 75 there is to be a council of Ministers with the Prime Minister at the

(14) A.I.R. 1955 S.C. 549.

head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet.

The same provisions obtain in regard to the Government of States; the Governor or the Rajpramukh, as the case may be, occupies the position of the head of the executive in the State but it is virtually the council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the council of Ministers consisting as it does, of the members of the legislature, is, like the British Cabinet, 'a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part '."

Again in the celebrated Bank Nationalisation case (*R. C. Cooper* v. *Union of India,* (15), Shah, J., speaking for the majority observed:—

"Under the Constitution the President being the constitutional head, normally acts in all matters including the promulgation of an Ordinance on the advice of his Council of Ministers."

Even in *Union of India* v. *Jyoti Prakash Mitter,* (9), on which much reliance was sought to be placed on behalf of the respondents, their Lordships have held as follows :—

"The President is by Article 74 of the Constitution the constitutional head who acts on the advice of the Council of Ministers in the exercise of his functions."

It is, therefore, manifest from legislative history, from the unanimous opinion of the constitutional authorities, and the binding observations of the Supreme Court that our Constitution envisages the President only as a constitutional head who acts primarily upon the advice of his Council of Ministers and the field of such advice is all pervasive. Except in the marginal and rare cases which are only in the nature of exceptions which go to prove the

(15) A.I.R. 1970 S.C. 564.

rule, the President acts only by the advice of his Cabinet. However, where the very nature of the power is such that it cannot possibly be exercised on the advice of the Council of Ministers it is then alone that the President may act otherwise. An example of this may be noticed where he is called upon to choose the Prime Minister after a general election. Obviously in such a situation he cannot act on the advice of the Council of Ministers. Even in this situation his supposed discretion, however, is deeply limited and hedged down by the settled convention that he must call upon the leader of the largest party in the Lok Sabha to form the Government and to nominate him as the Prime Minister. For our purpose it is not necessary to be exhaustive on the powers in which the President may have to act without the advice of his Cabinet. There is, however, no escaping the inevitable conclusion that under our Constitution so far as the President is concerned there appears to be no scope or basis for floating the theory that the President exercises any powers in his individual discretion or individual judgment. Such powers were expressly vested in the Governor-General by the Government of India Act, 1935 and these powers were expressly rejected and excluded by the Union Constitution Committee when drafting the Constitution. The Constituent Assembly accepted this and by necessary implication denuded the executive head of the Union, namely, the President of India of any such power. On comparing the two great constitutional systems, namely, the British and the American Constitutions from which the founding fathers drew their inspiration in our Constitution it had been said that the King of England reigns but does not rule, the President of America rules but does not reign but the President of India neither reigns nor rules. This addage is homely terms truely expresses the position of the President of India as a constitutional figure head.

(52) Is the position any different as regards the powers vested in the executive head of the States of the Union, namely, the Governor ? The answer again appears to be in almost identical terms as it is in the case of the head of the Union, namely, the President. The Constitution deals with the Union and the State executive separately but the provisions in both the Chapters, namely, Chapter 1 of Part V and Chapter 2 of Part VI follow a common pattern and are in most cases *mutatis mutandis* the same for the Union and for the States. The perusal and comparison of

the corresponding provisions dealing with the executive functions of the President and the Governor shows close similarity, if not identity on a variety of points. That the Governor is cast in the image of the President and in fact has more limited powers is apparent from the above-said provisions. The Governor unlike the President is not an elected head and by virtue of Article 155 he is appointed by the President and holds office during his pleasure. Under the emergency provisions of the Constitution, the Governor can merely act as a delegate of the President when he assumes to himself all the functions of the Government of the State. Reference in this regard may be made to Article 163(1) which is in the following terms :—

> "163(1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion."

The comparison of this provision with the corresponding Article 74(1) is instructive. This would make evident that the Constitution itself has in terms expressly provided where the Governor has to exercise any of his functions in his discretion. By necessary implication, the other functions of the Governor are to be discharged by him with the aid and advice of his Council of Ministers. The above quoted article, therefore, clearly lays down that except where the Constitution expressly says so, the Governor is to act merely as a Constitutional Head of the State who abides by the advice tendered to him by his Cabinet. In the later provisions that follow, the Constitution provides for the specific situation in which the Governor is to act apart from the advice of his Council of Ministers. Reference in this connection may be made to Article 371, sub-clause (1) and (2) which provide for the powers of the President to create any special responsibility of the Governor in regard to the matters mentioned in that Article. Again Article 371-A sub-clause 1(b) mentions clearly the situation where the Governor of Nagaland will exercise his individual judgment and individual discretion which shall be final. Again Article 371-A, sub-clause 2(b) and (f) mentions the powers which the Governor is to exercise in his discretion. Similarly in the Sixth Schedule to the Constitution

para 9 sub-clause (2) and para 18, sub-clause (3) specifically empower the Governor to act in his discretion.

(53) Reading the above said provisions with Article 163(1), the only result that seems to follow is that except for the specified provisions where the Governor is to act either in his individual discretion or in his individual judgment or in discharge of his special responsibility, he is to act in the remaining field of his functions according to the advice of his Cabinet.

(54) A perusal of the relevant provisions of the Government of India Act, 1935, which as already noticed was the immediate predecessor of the Constitution, is instructive in this regard. The above said statute had reserved a very large field of activity for the exercise of the Governor's individual discretion, his individual judgment and for discharging his special responsibilities. The Governor was to act in his discretion by virtue of section 50, 51, 57, 58, 59, 60(1)(a), 62, 63, 74(2), 75, 76, 78(4), 84, 86(2), 89, 92 and a large number of other sections. Similarly, the Governor exercised his individual judgment under section 50, 52, 54, 55, 56, 88, 89, 254(1) and a large number of other sections. The Governor was also vested with special responsibilities under section 52, 57(3), 83(3) and 273(3) of the above said Act. As already said, the Constitution makers were well aware of these provisions as also the exercise of these powers over a long period. It is, therefore, evident that the framers of the Constitution expressly excluded the scope of the individual discretion or individual judgment or individual capacity of the Governor in regard to the above-said powers, because no such language was deliberately used in the corresponding provisions of the Constitution. These powers were, therefore, expressly rejected and the Governor was made to conform as nearly as possible to a Constitutional Head of the Government, and the real executive power was vested in his Council of Ministers.

(55) However, I must notice that as in the case of the President, so in the case of the Governor in rare and exceptional cases where the very nature of the power to be exercised by him is such that he cannot either have the advice of his Cabinet or to act upon it then he will dischrage his functions in an independent manner without such advice. One example would be, where after a general election he has to select and appoint the Chief Minister upon whose

advice the remaining Council of Ministers is to be appointed. Obviously in such a situation, the Governor cannot have the advice of the Cabinet. Similarly when making a report to the President under Article 356 that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution, the Governor may well have to act independently of the advice of his Cabinet. However, leaving out these very exceptional cases and those where the Constitution expressly provides otherwise, it is evident that the Governor as a rule and as a matter of principle acts upon the advice of his Cabinet.

(56) It is unnecessary to elaborate this point further because what has been said by me above in the context of the powers of the President applies *mutatis mutandi* to the powers of the Governor with the exceptions noticed above. The observations already noticed in *Ram Jawaya Kapoor's case* (14), above deserve repetition in this context :—

> "The same provisions obtained in regard to the Government of the States; the Governor or the Raj Pramukh as the case may be occupies the position of the Head of the executive in that State but it is virtually the Council of Ministers in each State that carries on the executive Government."

In *Ram Chandra Bose* v. *Dr. H. C. Mukherjee, Governor, West Bengal* (16), the issue before the Court was whether in nominating the Members to the Legislative Council under Article 171(3)(e), the Governor was to act in his individual discretion. Mr. Justice Bose (who later adorned Bench of the Supreme Court) observed categorically as follows :—

> "It appears, however, from Article 163 that except in matters the Governor is required to act in his discretion, he is to act on the advice of the Council of Ministers.....It may be pointed out that Article 171 does not state that in making nominations the Governor is bound to act in his discretion. This expression "in his discretion" and another expression "in his individual judgment" are expressions which were freely used in the Government of India Act, 1935. Reference may be made to Sections 50,

(16) A.I.R. 1952 Cal. 799.

51, 52(3), 55, 56, 57, 58, 228 and various other sections of the Government of India Act, 1935. Unless a particular article expressly so provides, an obligation to act in his discretion cannot be imposed upon the Governor by mere implication. There is nothing to show that no rules as contemplated by Article 163(3) (sic) have been framed by the Governor, Article 163 makes it quite clear that except in cases the Governor is required to act in his discretion, he is to act on the advice of his ministers and so it must be presumed that in making the impugned nominations he must have acted on the advice of his council of ministers. The Court is entitled to presume the regularity of official acts."

(57) I am afraid that the ghosts of any inherent powers of individual discretion or of individual judgment or of individual capacity can now no longer be exercised. They lie buried deep in the debris of history. They cannot now be raised even for the laudable object of safeguarding the independence of the subordinate judiciary. The concepts of an inherent individual capacity or individual discretion of the Governor are concepts which run counter to the very spirit of the parliamentary democracy to which this country and the Constitution is irrevocably wedded. I hold, therefore, that except where it is expressly so mentioned in the Constitution, the Governor has no individual discretion or individual judgment to exercise unless by necessary intendment and by the very nature of the powers to be exercised, he cannot either have or act on the advice of his Council of Ministers.

(58) Having examined the matter in its larger context, one may now turn specifically to the language of Articles 233 and 234. This is so because the basic argument on behalf of the respondent is that under both these Articles, the Governor must act in his individual discretion and since the appointing authority is the Governor in his individual discretion, the power of removal also would similarly be vested in him in the same capacity. It is contended that the sanction to be valid must emanate from a person, competent to remove the respondent No. 1 and as that person is alleged to be a Governor in his individual discretion, the sanction Exhibit P.X. is challenged to be wholly invalid because it was not granted by him in the identical capacity.

(59) This contention appears to me to be lacking wholly in merit. Articles 233 and 234 of the Constitution are the direct successors of the corresponding provisions in the Government of India Act, 1935, namely Sections 254 and 255 thereto. A comparison of these provisions is indeed instructive and they are juxtaposed against each other hereunder for facility of reference.

Section 254(1) Appointments of persons to be and the posting and promotion of, district judges in any Province shall be made by *the Governor of the Province, exercising his individual judgment,* and the High Court shall be consulted before a recommendation as to the making of any such appointment is submitted to the Governor.	Article 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 His Majesty shall only be eligible to be appointed a district judge if he has been for not less than five years a barrister, a member of the Faculty of Advocates in Scotland, or a pleader and is recommended by the High Court for appointment.	(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.
(3) * * * * *	
Section 255(1) The Governor of each province shall, after consultation with the Provincial Public Service Commission and with the High Court, make rules defining the standard of qualifications to be attained by persons desirous of entering the Subordinate civil judicial service of a Province.	Article 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.

In this section, the expression 'subordinate civil judicial service' means a service consisting exclusively of persons intended to fill civil judicial posts inferior to the post of district judge.

(2) * * * * *

(3) * * * * *

(60) Taking first Article 233 of the Constitution and section 254 of the Government of India Act, 1935, it is evident that the Constitution has virtually adapted verbatim the language of section 254. Now section 254 had expressly vested the power of appointment of district judges in the individual judgment of the Governor of the Province. This provision of exercising the individual judgment has been deliberately and expressly excluded by the framers of the constitution in enacting Article 233. It is self-evident, therefore, that the framers of the Constitition in express terms abandoned the Governor's power of individual judgment in so far as the appointment of district judges was concerned. It would be straining all canons of interpretation to read the words "exercising his individual judgment" by implication into Article 233 when the framers expressly excluded them when adapting the section 254 of the Act of 1935. Therefore, there is no merit in the contention that in Article 233 the word "Governor" must be read as "Governor in his individual discretion". or "Governor in his individual judgment".

(61) Now comparing sections 254 and 255 of the Government of India Act again makes it evident that thereunder though the power of appointment, etc., of district judges was vested in the individual judgment of the Governor, no such provision was made as regards the appointment of persons holding judicial posts inferior to the posts of the district judge. Therefore, even under the Government of India Act which provided for the exercise of individual judgment in the case of district judges the subordinate judges thereto were not to be so appointed. The framers of our constitution again broadly adapted Article 234 from the language of section 255 of the Act. No change in this regard was made. It follows, therefore, that as in section 255 of the Act, so in Article 234, there is no scope to import

the exercise of individual discretion by the Governor in exercising his powers thereunder. The only possible inference that appears from the legislative history, therefore, is that the framers of the constitution excluded the scope of the individual discretion or judgment of the Governor from the appointment of district judges also as they had done in most of the other sections. The position of judges subordinate to the district judges was retained as it was because even under the 1935 Act the exercise of any such individual discretion was excluded in their context.

(62) Applying the basic tenets of the construction of statutes also, I take the view that it is unwarranted to introduce the words "in his discretion" or "in his individual capacity" into either Article 233 or 234, when the framers of the constitution did not choose to put these words there. The language used in both the Articles is "Governor of the State" and no surplusage to that word can be added by implication or by a method of strained construction. The rule of construction is clear and unequivocal that the plain language of a statute must be first construed grammatically without importing words therein. A reading of Article 233 or 234 as they stand does not show any ambiguity or obscurity nor does their plain meaning lead to any inevitable absurdity. It is, therefore, a violation of the settled canons of interpretation to attempt to add words in the plain language of these provisions. The Full Bench in *Mahesh Chandra and another* v. *Tara Chand Modi* (17), correctly reiterated the rule in the following terms:

> "It is not open to add to the words of the statute or to read more in the words than is meant, for that would be legislating and not interpreting a legislation.

Again there are the weighty and the binding observations of the Supreme Court also which patently repel the theory of individual discretion as regards even Article 233 upon which basically the argument for the respondent is based. These observations appear in *Chander Mohan's case* (11), upon which even the learned counsel for the respondent had placed reliance and are in the following terms:

> "We are assuming for the purpose of these appeals that the "Governor" under Article 233 shall act on the advice of the Ministers. So, the expression "Governor" used in the

(17) A.I.R. 1958 All. 374.

judgment means Governor acting on the advice of the Ministers."

(63) In view of the above, I must hold with respect that there appears to be no warrant for importing or introducing the words "individual discretion" or "individual capacity", etc., into the plain language of both Articles 233 and 234.

(64) It now remains to consider first the decisions of the Supreme Court upon which reliance was sought to be placed by Mr. Mittal for his theory of "individual capacity" and "individual discretion" to be exercised both by the Governor and the President. In this context, the primary reliance of the learned counsel was upon the observations in *Nripendra Nath Bagchi's case* (10). Therein the primary question before their Lordships was whether the Government or the High Court was empowered to order, initiate and hold enquiries into the conduct of the district judges. A reference to this judgment shows that their Lordships referred to Articles 235 and 311 of the Constitution and primarily construed the scope of the word "control" used in Article 235. The point which is before this Bench was not even remotely at issue in *Bagchi's case* (10). Hidayatullah J. (as his Lordship then was) speaking for the court lucidly delineated the history of the Articles 233 to 237. His Lordship quoted extensively from the report of the Islington's Commission as early as the year 1912. Reference was also made in detail to the report of the Joint Parliamentary Committees. Reference was also made to the earlier provisions of the Government of India Act, 1919. Thereafter the recommendations of numerous other Committees were also referred to including those of the Indian Statutory Commission and the Joint Parliamentary Committee. However, it is worthy to remember that mere history of the legislation is not by itself law and the reports and recommendations of Commissions and Committees are not statutes. In fact, after referring to the Islington's Commission, it was observed in *Bagchi's case* (10), as follows:

> "The recommendations of the Islington's Commission remained a dead letter."

As regards the various Committees, which had adverted to this subject, his Lordship noticed that:

> "There was more concern about the Europeans than about the independence of the judiciary."

There is nothing in this judgment which can lend support to the argument sought to be advanced on behalf of the respondents and indeed the words "individual discretion", "individual judgment" or "individual capacity" are conspicuous only by their absence. That too much should not be read into this judgment merely from the delineation of history, etc., is evident from the subsequent observations in *State of Orissa* vs. *Sudhansu Sekhar Misra and others* (18), wherein Justice K. S. Hedge struck a note of caution in these terms when referring to Bagchi's case :—

> "The only question that fell for decision in that case was whether the Government of West Bengal was competent to institute the disciplinary proceedings against the Additional District and Sessions Judge. This Court upheld the decision of the High Court of Calcutta holding that it had no such jurisdiction. That was a single question decided in that case. It is true that in the course of the judgment the Court observed that the High Court is made the sole custodian of the control of the judiciary, but that observation was made only in the context of the question that arose for decision."

and further :

> "A decision is only an authority for what it actually decides. What is of the essence in decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it."

(65) The learned counsel for the respondent had also chosen to place some reliance on *Babu Ram Upadhya's case* (4). Reference was made to the formulation of the seven propositions made by their Lordships in that case which appear in para 22 of the report above said. These observations, however, again do not in any way advance the case of the respondents on this point. What further deserves notice is that their Lordships subsequently in a Bench of seven Judges in *Moti Ram Deka's case* (5), explained and confined the observations in *Babu Ram Upadhya's case* (4), in the following terms :—

> "In the context, it would be clear that this latter observation is not intended to lay down that a law cannot be made

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

under Article 309 or a Rule cannot be framed under the proviso to the said Article prescribing the procedure by which, and the authority by whom, the said pleasure can be exercised. This observation which is mentioned and proposition number (2) must be read along with the subsequent propositions specified as (3), (4), (5) and (6). The only point made is that whatever is done under Article 309 must be subject to the pleasure prescribed by Article 310. Nayudu, J. was, therefore, in error in holding that the majority decision of this Court in the case of *Babu Ram Upadhya* (4), supported his broad and unqualified conclusion that Rule 149(3) was invalid for the sole reason that the power to terminate the services had been delegated to the Railway Administration."

Babu Ram Upadhya's case (4), therefore, has to be read within the circumscribed limit placed upon it in *Moti Ram Deka's case* (5). So read, it does not even remotely aid the case of the respondent.

(66) Mr. Mittal had then repeatedly adverted to the observations in the majority judgment in *Jayantilal's case* (6). These appear in paragraph 12 of the report above-said. A perusal of the judgment, however, shows that the issue before their Lordships was considered primarily in the context of Article 258(1) of the Constitution. The basic ratio of the judgment is that Article 258(1) enables the President to entrust to the State and its officers such functions which were vested in him as the powers of the Union and which were exercisable by the President on behalf of the Union. Their Lordships held that Article 258 did not authorise the President to entrust other functions which were not the functions of the Union to the States by virtue of the said Article. They then proceeded to notice an argument which was characterised as being based upon an erroneous premise and rejected the same. Reference was made to the powers of the President under Articles 123, 356, 360 and 309 and it was opined that these were not the powers of the Union, but were powers vested in the President by the Constitution *and were not capable of being delegated or entrusted to any other body or authority under Article* 258(1). Reference was also made in express terms to the powers of the President under Articles 124, 217, 344, 340, 330, 310 and 311(2) which were classified as the executive powers of the President which also may not be delegated or entrusted to another body or officer

because they did not fall within the ambit of Article 258. Even a cursory reference to the above-said powers enumerated by their Lordships under the respective Articles seems to make it clear that the President exercises these powers as a constituional head upon the advice of his cabinet. This is evident from the subsequent pronouncement of their Lordships. In *F. N. Rana's case* (6), express mention was made of the President's powers to promulgate ordinances under Article 123 as being one which was vested in him as such. In *R. C. Cooper's case* (15), their Lordships clearly elaborated this as follows:—

> "Under the Constitution, the President being the constitutional head, normally acts in all matters including the promulgation of an Ordinance on the advice of his Council of Ministers. Whether in a given case the President may decline to be guided by the advice of his Council of Ministers is a matter which need not detain us. The Ordinance is promulgated in the name of the President and in a constitutional sense on his satisfaction; it is in truth promulgated on the advice of his Council of Ministers and on their satisfaction."

A close analysis of the judgment in *Jayantilal's case* (6), would show that it is no warrant whatsoever for the theory that in respect of the vital powers enumerated therein the President acts in his individual discretion, individual judgment or in his individual capacity. Indeed not at one place in the judgment is any such terminology used. I am unable to find a word in this judgment which could possibly lend support to the doctrine advocated on behalf of the respondent.

(67) From the gamut of the case law which has arisen around the interpretation of the Constitution for the last 22 years before the Supreme Court not a single judgment of their Lordships could be brought to our notice by the learned counsel in which the words 'individual discretion' or 'individual judgment' or 'individual capacity' have been used in the context of the powers exercisable by the President. The identical position subsists as regards the powers of the Governor except where the Constitution expressly confers such powers upon him or they flow to him by necessary intendment. Coming specifically to the relevant Articles 233 to 237, these recently have been the subject-matter of numerous cases before their Lordships of the Supreme Court in *Mohammad Ghouse* v. *The State of*

Andhra (3), *The State of West Bengal* v. *N. N. Bagchi* (10), *Chandra Mohan* v. *State of U.P.* (11), *The State of Assam* v. *Ranga Muhammad* (19), *State of Orissa* v. *Sudhansu Sekhar Misra* (18), *The State of Assam* v. *Kuseswar Saikia* (13) and *Chandramouleshwar Prasad* v. *The Patna High Court* (20). Not in one of these cases has there been even a remote observation that the Governor in the exercise of the powers under the said Articles acts in his individual capacity or individual discretion. Indeed we had repeatedly asked Mr. Anand Saroop to cite any judgment of the Supreme Court where any such terminology has been used in the context specifically of these articles. Learned counsel had to frankly concede his inability to cite any such authority.

(68) Having considered the binding precedents of the Supreme Court above, I now advert to the decisions of this Court which have a direct bearing on the point at issue. Undoubtedly the judgment which directly lends support to the contention on behalf of the respondent is the Division Bench authority of *Manmohan Singh Tandon's case* (12). The issue before the Bench was the validity of the appointment by the Chief Commissioner of Mr. Man Mohan Singh Gujral (now Hon'ble Mr. Justice) as the District Judge of the Union Territory of Chandigarh under Article 233 of the Constitution. The identical argument was raised before the Bench and noticed by them in the following terms:—

> "The central point around which the web of these arguments is woven is that 'Governor' in clause (1) of Article 233 of the Constitution is equated to 'Governor in his individual capacity' and not as the mere constitutional head of the State in whose name the Ministers pass all executive orders. In the Government of India Act, 1935, a distinction was maintained between the exercise of executive authority by the Governor-General and by the Governors either in their respective individual judgment (i.e. in their discretion) or with the aid and advice of their respective Councils of Ministers. Part of that distinction has been retained in the Constitution."

A perusal of the judgment would show the above-said contention was accepted by the Bench and it was held that in the States where a

(19) A.I.R. 1967 S.C. 903.
(20) A.I.R. 1970 S.C. 370.

Council of Ministers is in existence such Cabinet must be excluded from the exercise of the power of appointment by the Governor under Article 233(1) though the position was held to be different in Union Territories where no popular ministry was functioning. The relevant observations are in the following terms :—

> "Keeping in view the legislative history of the provisions of Article 233(1) of the Constitution and the history behind the enactment of section 254 of the Government of India Act 1935 as well as observations of their Lordships of the Supreme Court in the *State of West Bengal and another* v. *Nripendra Nath Bagchi* (10) (supra) and the scope of difference between certain specified constitutional powers of the Governors on the one hand and the executive powers of the State Government headed by the Governor on the other as brought out in the case of the President of India by the Supreme Court in *Jayantilal Amaratlal Shodhan* v. *F. N. Rana and others* (6), it seems that in States administered by a Governor with the aid of Council of Ministers, the Governor himself is the appointing authority named by the Constitution and that the functions assigned to him by clause (1) of Article 233 of the Constitution cannot be performed by the State Government merely in the name of the Governor, but so far as the Union Territories in which there is no Council of Ministers are concerned, the position is different. The argument of Mr. Khoji to the effect that the intention behind the particular phraseology used in Article 233 of the Constitution is to keep the Ministers out of the appointment of District Judges as much as possible, would not apply to such a Union Territory as no question of any ministerial interference can arise and it is the President of India who is to either administer the territory himself or through an Administrator to the extent to which he may delegate his functions to such Administrator."

(69) With deep respect, I take the view that the above-said observations do not lay down the correct law. The Bench relied primarily on three factors for arriving at the above-said conclusion. I have already adverted in detail to the legislative history of Articles 233 to 237 and the corresponding provisions of the Government of India Act, 1935. This history far from lending any support to the theory of

individual capacity or individual discretion indeed runs wholly contrary to the same. I have in quite detail adverted to the ratios of and the observations in both *Bagchi's* (10) *and Jayantilal's cases* (6) above and am of the view that these authorities do not even remotely mention any concept of individual discretion or individual judgment. Again even accepting for the moment the theory of the constitutional powers of the President or the Governor, there is nothing therein to hold that such powers have to be exercised in their individual judgment or individual discretion. Also I am of the view that on the above-said interpretation a rather anamolous result would ensue because the same provision of Article 233(1) would have to be interpreted differently in the case of States where the Council of Ministers exists and in the case of Union Territories where such cabinets are not in existence. It is further to be noticed that by the Union Territories Act in certain Union Territories also the Council of Ministers has been brought into existence. In this context there would arise obviously an irreconsilable contradiction in the interpretation of Article 233(1). I would, therefore, respectfully hold that on this particular point *Man Mohan Singh Tandon's case* (12) is wrongly decided.

(70) This then brings me to the judgment upon which also primary reliance is placed by Mr. Mittal, namely, *Murari Lal Puri's case* (1) (supra). That was a case pertaining to the grant of sanction for the prosecution of a District Judge for an offence under the Prevention of Corruption Act. It, therefore, bears a close identity to the issue before us though the matter primarily in that case had to be considered under Article 233. The judgment in this case primarily followed the earlier decision *in Man Mohan Singh Tandon's case* (12). What is, however, of particular significance is that in the said judgment which was placed upon a reference before the larger Bench, the learned Judges of the Division Bench did not even at any stage use the words 'individual capacity, individual judgment or individual discretion' as being the necessary pre-requisites of the exercise of the powers under Article 233(1). Indeed I had the privilege of discussing the matter with Mahajan, J., who had prepared the judgment of the Division Bench and am authorised to say that my learned brother Mahajan, J. did not base his decision on the footing that the Governor under Article 233(1) acts in his individual discretion or in his individual judgment. *Murari Lal Puri's case* (1) therefore, has to be read in this context and therefore afford no support whatsoever to the contention advanced on behalf of the respondents. I would, however, later have

to advert to this judgment on the point whether the Governor under Article 233 acts in the exercise of his executive functions or not. It appears, therefore, that apart from the decision *in Manmohan Singh Tandon's case* (12) (which I have already respectfully held to be erroneously decided) there is no other judgment of this Court or of any other High Court which was brought to our notice which could possibly support the theory of the individual judgment or individual capacity of the Governor in the exercise of his powers under Articles 233 and 234.

(71) We had repeatedly asked Mr. Mittal to formulate some principle or rationale as to why the word 'Governor' in Articles 233 and 234 should be construed as the Governor in his discretion in patent contradistinction to other Articles in the Constitution where the word 'Governor' has been used. Learned counsel could give us no satisfactory criteria or principle why the word 'Governor' should be so construed in the above said two Articles. Only and obviously untenable argument advanced was that because the word used in these Articles is Governor it should be construed as the Governor personally and not acting through his Council of Ministers. Learned counsel was confronted with the use of the word 'Governor' in Articles 161, 163, 165(3)(e) and 171(5), 202, 205, 213(1) and 213(2)(b). Obviously in all these provisions and many others in the Constitution it cannot reasonably be said that the Governor whilst exercising his functions under all these Articles acts in his individual discretion or in his individual judgment. Such a construction would virtually render a constitutional head like the Governor to be a despot wielding all the powers with the resultant effect of denuding the Council of Ministers of all actual powers. Obviously no such result was ever so intended by the Constitution. There is, therefore, no reason to construe the use of the word 'Governor' differently in Articles 233 and 234 as compared to the other Articles in the Constitution. It was rightly pointed out by Mr. Mann on behalf of the appellants that the word 'Governor' throughout in the abovesaid provisions is being used as the Constitutional head of the State Government. It was further pointed out that in Chapters 1 to 4 of Part VI of the Constitution the words 'State Government' are conspicuous by their absence and the terminology used throughout to signify the same is the word 'Governor' symbolising the same.

(72) Reference may usefully be made also to Article 124 which provides for the appointment of the Chief Justice of India and the

Judges of the Supreme Court of India. Therein the power of appointment is vested in the President. Similarly under Article 217 power of appointment of High Court Judges vests in the President also. It was never even sought to be argued before us that in the appointments to these high offices under Articles 124 and 217, the President must act in his individual discretion or individual judgment or individual capacity and exclude the advice of his cabinet to avoid the supposedly harmful political pulls and pressures which may influence his elected Council of Ministers who inevitably are responsive to the members of the Parliament. It was conceded before us that as a matter of practice in these appointments, the President acts only as a constitutional head. If in the vital appointments of the Judges of the Supreme Court and the High Courts the advice of the Council of Minister can and does come in, then one fails to see why the situation should be radically different in the case of appointments of District Judges and Judges inferior to them, namely, Subordinate Judges. As a matter of fact, the argument in this context stems from a needless and pointless suspicion of the working of a political democracy. It is only in a very limited context that their Lordships of the Supreme Court have said that under Article 217(3), the President should exclude the advice of his cabinet. That case is specifically based on the reasoning that when determining the age of a Judge under the abovesaid provision the President acts judicially and as is manifest in the exercise of judicial functions no issue of any advice from another source can be conceivable. This is evident from the following observations appearing in the said judgment in *Union of India* v. *Jyoti Prakash Mitter* (9):—

> "It is necessary to observe that the President in whose name all executive functions of the Union are performed is by Article 217(3) invested with judicial power of great significance which has bearing on the independence of the judges of the higher Courts.

and again

> The President acting under Article 217(3) performs a judicial function of grave importance under the scheme of our Constitution. He canont act on the advice of his Ministers."

A perusal of the judgment in the abovesaid authority would show that by implication it has been said that whilst exercising the power of appointment under Article 217, the President acts as the constitutional head and it is only under Article 217(3) in determining the age

of a Judge that he acts judicially and therefore independently of the advice of his Cabinet.

(73) As has been noticed at the very beginning the argument on behalf of the respondents has a large emotional content. It was argued that the interpretation canvassed on behalf of the respondents would advance the laudable object of the independence of the judiciary. However, I ask whether we can advance the case of the independence of subordinate judiciary by vesting the power of appointment, removal and dismissal etc. of the incumbents of these posts entirely in the individual capacity or discretion of the Governor ? Historically it deserves notice that only section 254 of the Government of India Act, 1935, provided for the exercise of the individual judgment by the Governor in the appointment etc. of District Judges. The object primarily was to protect the European members of the Indian Civil Service, who were invariably appointed directly to the post. As was noticed *in Bagchi's case* (10), 'there was more concern about safeguarding the interests of the Europeans rather than any altruistic object of the independence of the judiciary.' That purpose of protecting the Europeans was no longer necessary as a matter of history and the Constitution makers expressly excluded the words 'individual judgment' when adopting Article 233 from its predecessor section 254 of the Act. The argument on behalf of the respondents would have some meaning and content if it could be said that on the interpretation suggested the subordinate judiciary should be safeguarded from interference by the executive by vesting the relevant powers in the High Court only. However, in attempting to vest these vital powers in relation to the subordinate judiciary in the uncontrolled, unguided and uncanalised discretion of the Governor (which is neither amenable to the judicial nor legislative control) we do not in any way advance the laudable object of the independence of the subordinate judiciary. Indeed such a construction may have an opposite effect and lead to serious pitfalls. It is no secret that the incumbents of the office of the Governor are invariably the appointees of the political party in power at the centre and not unoften are themselves men with a political background. The contention that such an interpretation would lead to the exclusion of any political pulls and pressures in regard to the subordinate judiciary is, threfore, hardly tenable.

(74) Having held that neither under Article 233 nor under Article 234 does the Governor act in the individual discretion, it remains to

consider whether he exercises this function in discharge of the executive power of the State vested in him. Reference in this context may first be made to Article 154 which vests the executive power of the State in the Governor and makes it exerciseable by him either directly or through officers subordinate to him in accordance with the Constitution. The next relevant provision is Article 162 which provides that the executive power of the State shall extend to those matters with respect to which the Legislature of the State has powers to make laws. The relevant provision in this context is entry 3 of List II of the Seventh Schedule which is in these terms :—

> "Administration of justice, constitution and organisation of all courts, except the Supreme Court and the High Court, officers and servants of the High Court, procedure in rent and revenue courts, fees taken in all courts except the Supreme Court."

Reading the abovesaid provisions together it is thus patent that the constituion and organisation of all Courts subordinate to the High Court within the State which would obviously include the Presiding Officers of the same is within the legislative competence of the State and thus clearly falls within the executive powers thereof. The appointments, therefore, of the District Judges and the Subordinate Judges under Articles 233 and 234 manifestly appear to be within the ambit of the executive power of the State. It was not disputed before us that the appointments of other incumbents to the public service by the Governor falls within the ambit of his executive power. No distinction could be shown to us as to why when acting under identical or similar powers in regard to the District Judges and the Subordinate Judges, the Governor would be acting in any different capacity. Principle apart this appears to be well-settled by the observations of the Supreme Court *in Ram Jawaya Kapur's case* (14). After quoting the provisions of the Article 162, their Lordships have observed as follows :—

> "Thus under this article the executive authority of the State is exclusive in respect to matters enumerated in List II of the Seventh Schedule. The authority also extends to the Concurrent List except as provided in the Constitution itself or in any law passed by the Parliament.

and again

> It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after "legislative and judicial functions are taken away."

Their Lordships elaborated this concept and reiterated the view in more categorical terms subsequently in *Jayanti Lal's case* (6) in these terms :—

> "* * * * *. In the view of the High Court functions which were not judicial or legislative would not necessarily be regarded as executive, and that certain functions which did not fall within the three recognised categories—legislative, judicial and executive, may be placed in the category of miscellaneous functions. *But it is now well-settled that functions which do not fall strictly within the field Legislative or judicial, fall in the residuary class and must be regarded as executive.*

> In Halsbury's Laws of England, 3rd Edition Vol. 7, Art. 409 p. 192 it is observed :

> 'Executive functions are incapable of comprehensive definition, for they are merely the residue of the functions of government after legislative and judicial functions have been taken away. They include, in addition to the execution of the laws, the maintenance of public order, the management of Crown property and nationalised industries and services, the direction of foreign policy, the conduct of military operations, and the provision or supervision of such services as education, public health, transport, and state assistance and insurance.'

> Similarly in Wade and Phillips' Constitutional Law 6th Edition, at p. 16 it is observed :

> "It is customary to divide functions of government into three classes, legislative, executive (or administrative) and judicial !"

From the above enunciation of the law it is obvious that their Lordships have accepted and approved the settled view that all State functions which do not fall within the ambit of either being legislative or judicial fall in the residuary class of the executive functions. Now it appears to be patent that the appointment to the civil service is neither a legislative nor a judicial function. It thus necessarily is an executive function and the appointments under Articles 233 and 234 therefore, appear to me to be plainly the exercise of the executive power by the Governor. At the highest these Articles provide a mode or the manner of the exercise of such power. No reasons could be cogently advanced before us to suggest that in appointing initially subordinate Judges under Article 234 who begin service as probationers in the post of the Subordinate Judges of the Fourth Class, the Governor would be exercising a power of such vital import which could not fall within the executive power of the State. I am clearly of the view that both under Articles 233 and 234, the Governor acts in the exercise of the executive power of the State vested in him.

(75) I must, however, notice the opinion of the Bench recorded to the contrary *in Murari Lal Puri's case* (1), that in the exercise of his functions under Article 233 the Governor does not act in the exercise of the executive functions of the State. A perusal of the judgment would show that reliance primarily was placed for the view on the earlier authority of *Manmohan Singh Tandon's case,* (12) which I have already opined to be erroneously decided on the point. Reliance was also placed for the view on the observations *in Babu Ram Upadhaya's case* (4) but it was not noticed that their Lordships of the Supreme Court subsequently *in Moti Ram Dekka's case* (5) had restricted the import of the observations and the conclusions arrived therein. With respect, therefore, I take the view that the learned Judges of the Bench erred in holding that the exercise of power under Article 233 by the Governor was not in discharge of his executive functions.

(76) The view I am inclined to take receives patent support from the observation *in Jayantilal's case* (6). Therein at para 12 of the report, their Lordships expressly held that the power of appointment of Judges by the President under Articles 124 and 217 was in exercise of the executive powers of the President. Now it deserves notice that Article 234 appears in the Chapter following that in which Article 217 regarding the appointment of High Court Judges is placed. If the

appointment of both the Supreme Court and the High Court Judges is the exercise of the executive powers of the President, I fail to see why the exercise of the power of appointment by the Governor of the Subordinate Judges would not fall patently within the executive powers of the Governor.

(77) I may now come specifically to Article 234 of the Constitution which is directly applicable to the present case. Whatever may be the position as regards Article 233, it seems manifest that Article 234 obviously stands on a different footing both in its language and content. Historically speaking I have already noticed that the predecessor section of this Article 234, namely, Section 255 of the Government of India Act made no mention whatsoever of the Governor acting in his individual discretion thereunder in sharp distinction with section 254 which expressly mentions the exercise of individual judgment by the Governor in the appointment of the District Judges. It would appear, therefore, that the appointment of Judges inferior to the District Judges as a matter of history had also been distinguishable and was on a different basis under the Government of India Act 1935. Now adverting specifically to the language of this Article 234, it expressly provides for the promulgation of rules after consultation with the State Public Service Commission and the High Court for the purpose of the appointment of Subordinate Judges. A power which is to be exercised wholly in accordance with the rules and statutory provisions is obviously one in sharp distinction to the power exercised in the individual judgment or the individual capacity of the incumbent. In any case under this Article the Constitution expressly provided for the creation and promulgation of rules for the purpose and it would be idle to contend that such rules when framed and enacted in accordance with the procedure provided by the Article would still have the taint of unconstitutionality about them. It was not denied before us that in the framing of the relevant rules, the necessary formalities and the requirements of Article 234 have been duly complied with and there has been adequate and necessary consultation both with the State Public Service Commission as also the High Court. It was thereafter that the Punjab Civil Services (Judicial Branch) Rules duly notified on the 26th of October, 1951, in the Home Gazette stand promulgated. It is unnecessary to burden this judgment with all the detailed procedure laid down therein for the appointment, removal, dismissal, censure etc. provided for under these rules in relation to

the Subordinate Judges. It suffices to mention that indeed very detailed provisions are made in this regard as is evident from the body of the rules. Reference can usefully be made only to Rule 7 in Part 'D' of these rules—the relevant part whereof reads as under :—

> "The name or names of the selected candidate or candidates will be forwarded to Government for appointment as Subordinate Judges under Article 234 of the Constitution of India. Every Subordinate Judge shall, in the first instance, be appointed on probation for two years but this 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."

It is evident from the above that by virtue of this rule the power of appointment is sought to be vested in the Government. What is even more directly relevant are the appendices 'A' and 'B' to Part 'F' of the Rules which relate to Discipline, Penalties and appeals. A perusal of these two appendices would show that vide entries (e), (f) and (g) of appendix 'A', suspension, removal and dismissal of the Subordinate Judges is vested by the Rules in the Government. Similarly vide appendix 'B', reduction of pension and the termination of appointment prior to superannuation are again powers vested in the Government. On behalf of the respondents no specific argument urging the invalidity or unconstitutionality of the relevant rules and appendicies could be advanced apart from the general contentions which stand noticed earlier and rejected. I would, therefore, hold that these rules are valid and by virtue thereof, the power of removal and dismissal is rightly vested in the Government. In this context one may also notice the argument of Mr. Mann on behalf of the appellant that for the purpose of the sanction under section 6 of the Prevention of Corruption Act, 1947 (under which the relevant sanction P.X. has been issued) what is relevant is as to who is the authority competent to remove the public servant concerned. It was argued by him that irrespective of the power of appointment, the power of removal is rightly vested in the Government by these Rules. Further it was also contended that appointments apart removal from a post held is obviously and patently an example of the exercise of the executive power of the State. Once it is held as I do that the authority empowered to remove or dismiss respondent No. 1 is the State Government then it follows straightaway from the language of section 6 that

the impugned sanction P.X. cannot be tainted with invalidity. The relevant provisions of section 6(1)(b) and (c) are in these terms :—

6. "*Previous Sanction necessary for prosecution*—

(1) No court shall take cognisance of any offence punishable under section 161 or section 164 or section 165 of the Indian Penal Code, or under sub-section (2) of sub-section (3-A) of section 5 of this Act, alleged to have been committed by a public servant, except with the previous sanction,

(a) * * * *

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of the State Government,

(c) in the case of any other person, of the authority competent to remove him from his office."

Reading sub-clause (b) above it is patent that the respondent No. 1 is obviously a person employed in connection with the affairs of the State and by the application of the relevant rules is removable from office by or with the sanction of the State Government. Deducing therefrom it follows that the sanctioning authority under section 6(1) above would be the State Government and no other. Reliance was then rightly placed on the Rules of Business of the Punjab Government and the business of the Punjab Government (Allocation) Rules 1966. It deserves mention that on behalf of the respondents no challenge to the validity of these rules was made. These have been duly promulgated under Article 166 of the Constitution by the Governor. Reliance was placed on entry 18 thereof and the relevant entry 28(1). On these bases it was rightly pointed out that the Chief Minister by these Rules was fully authorised thereunder and it is not in dispute that the Chief Minister had approved the sanction which was subsequently issued in accordance with the rules. It would follow that no taint of illegality would, therefore, attach to the sanction Exhibit P.X.

(78) Undoubtedly the authority which bears directly on the point and the conflict with which made the reference to the Full

Bench necessary is the Division Bench judgment in *Shamsher Singh's case* (2). This was a case primarily under Article 234 and the point at issue was as to the authority competent to terminate the services of a Subordinate Judge and the authority competent to issue a show cause notice to him. In this case also the termination of the services was done wholly by the Chief Minister and in fact the notice to show cause was issued only by the Chief Secretary. The Governor at no stage came into the picture. The Division Bench in reversing the judgment of the trial Court held that both the termination and the issuance of the show cause notice were valid. Reliance was placed by the Bench directed on the Supreme Court judgment *in Mohd. Ghouse's case* (3). The cases upon which reliance has been placed on behalf of the respondent, namely, *Manmohan Singh Tandon's case* (12), *Bagchi's case* (10) and *Jyoti Prakash Mitter's case* (8) were considered by the Bench and held to be inapplicable. However, it deserves notice that Dhillon, J., who prepared the judgment of the Division Bench in paragraph 5 of the report noticed certain contentions of Mr. Sibal learned counsel for the appellant to the effect that the Goveror under Article 233 acts in his individual discretion. Those observations merely notice the contention made *ex-concessnis* by the learned Advocate-General and apparently based upon the judgment of this Court *in Manmohan Singh Tandon's case* (12). On a consideration of the reasoning and the ratio in *Shamsher Singh's case* (2), which directly applies, I take the view that this judgment correctly lays down the law as regards the case of Subordinate Judges under Article 234 of the Constitution of India.

(79) In fairness to Mr. Mann, the learned counsel for the appellant, I must notice that he placed reliance on section 3(60) of the General Clauses Act, 1897 which defines the State Government. In particular sub-section (c) thereof lays down that the State Government as respects anything done or to be done after the commencement of the Seventh amendment to the Constitution would mean in a State the Governor. Learned counsel's basic contention was that the Governor and the State Government are in fact interchangeable terms in view of this definition. He also wished to read the relevant portion of the Judicial Service Rules wherever the word 'Governor' has been used to mean it to be synonymous with the word 'State Government.'

(80) On another point reliance on behalf of the appellant was also placed *on Manmohan Singh Tandon's case* (12). Therein it had

been held that the power of appointment even under section 233(1) was delegatable and had been validly exercised by the delegate of the President, namely, the Chief Commissioner of the Union Territory of Chandigarh. Reliance was also placed on the appellant's behalf on the observations *in Moti Ram Deka's case* (5), which have already been quoted in the earlier part of this judgment. Therein their Lordships have definitely held in the context of Article 309 that a rule can be framed prescribing the procedure by which, and also the authority by whom, the said pleasure under Article 310 can be exercised. These observations would clearly show that power to delegate by legislation or by the rule making authority of these powers is not precluded.

(81) Mr. Mann also placed reliance on sub-section (2) of Article 166. It was contended that as prescribed by the Rules of Business duly promulgated by the Governor the impugned sanction Exhibit P.X. has been duly authenticated in the manner specified by those Rules. It has been expressly made in the name of the Governor and authenticated in the manner prescribed by the Rules of Business. Consequently it was contended that no challenge could be posed to Exhibit PX on the ground that this was not an order made or executed by the Governor. In view of the fact that in the foregoing discussion I have already taken a view favourable to the appellant I deem it unnecessary to pronounce upon these contentions and it suffices to notice them as above.

(82) I hold, therefore, that under Article 234, the Governor acts only in his capacity as the formal head of the executive of his State. He does not act therein in his individual capacity or individual discretion or individual judgment. Further that under the said Article the Governor merely exercises the executive power of the State vested in him by the Constitution. I take the view that the relevant provisions of the Punjab Civil Service (Judicial Branch) Rules, 1951 are valid and constitutional having been duly and legally promulgated under Article 234. By virtue of these Rules the removing and dismissing authority of a Subordinate Judge is the State Government. Also that the relevant provisions of the Punjab Rules of Business, to which reference has been made earlier are legal and were fully applicable in the present case.

(83) It follows from the above that the impugned sanction Exhibit P.X. emanates from an authority legally competent to grant the

same under section 6(1) of the Prevention of Corruption Act as regards respondent No. 1, Shri Om Parkash Dharwal and the same is valid and legal. The Court below was, therefore, wrong in holding that the trial of the respondent was without jurisdiction and I would hold that its order is liable to be set aside. I would accept the appeal and remand the case back to the Special Judge for decision on merits and in accordance with the law.

D. S. TEWATIA, J. :—

(84) I have had the privilege of perusing the judgments separately recorded by my brothers Koshal and Sandhawalia, JJ. With respect, I concur in the view taken by my brother Sandhawalia, J. and hold that this appeal be allowed and the case be remanded back to the Special Judge for decision on merits and in accordance with law.

ORDER OF THE COURT

(85) In view of the opinion of the majority, the appeal is accepted, the impugned order is set aside and the case is remanded to the trial Court for decision on merits and in accordance with law.

K. S. K.

6013 ILR Govt, press, Chd,