State Of Bihar & Anr vs Bal Mukund Sah & Ors on 14 March, 2000

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Bench: S.B.Majmudar, V.N.Khare, U.C.Banerjee, R.P.Sethi

CASE NO.:
Appeal (civil) 9072 of 1996

PETITIONER:
STATE OF BIHAR & ANR.

RESPONDENT:
BAL MUKUND SAH & ORS.

DATE OF JUDGMENT: 14/03/2000

BENCH:
S.B.MAJMUDAR & G.B.PATTANAIK & V.N.KHARE & U.C.BANERJEE & R.P.SETHI

JUDGMENT:

JUDGMENT DELIVERED BY:

S.B.MAJMUDAR G.B.PATTANAIK U.C.BANERJEE R.P.SETHI JJ.

S.B.Majmudar, J.

Leave granted in Special Leave Petition No.16476 of 1993.

Both these appeals, on grant of special leave under Article 136 of the Constitution of India, are moved by the State of Bihar, which is common appellant no.1 in both these appeals. In Civil Appeal No.9072 of 1996 the Secretary, Department of Personnel and Administrative Reforms, Government of Bihar is appellant no. 2, while in the companion appeal arising from the Special Leave Petition No. 16476 of 1993, the other contesting appellant is the Special Executive Officer-cum-Deputy Secretary, Bihar Public Service Commission, Patna. In both these appeals, a common question of law arises for consideration, namely, whether the Legislature of the appellant State of Bihar was competent to enact the Bihar Reservation of Vacancies in Posts and Services (for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1991 (hereinafter referred to as the Act), in so far as Section 4 thereof sought to impose reservation for direct recruitment to the posts in the Judiciary of the State, subordinate to the High Court of Patna, being the posts of District Judges as well as the posts in the lower judiciary at the grass-root level, governed by the provisions of

the Bihar Judicial Service (Recruitment) Rules, 1955. Civil Appeal No.9072 of 1996 deals with the question of reservation in the posts in District Judiciary while the companion appeal deals with the posts in Subordinate Judiciary at grass-root level under the District Courts concerned. By the impugned judgment in Civil Appeal No.9072 of 1996, a Division Bench of the High Court has struck down the terms of the advertisement, reserving amongst others, 27 out of 54 posts of District Judges to be filled in by direct recruitment, being ultra vires the relevant provisions of Article 233 of the Constitution of India. It has also struck down the provisions made in the impugned advertisement fixing up the upper age limit at 45 years for eligibility for appointment by way of direct recruitment to these posts. That part of the controversy no longer survives between the parties in the present proceedings and, therefore, we need not dilate on the same. So far as the companion appeal is concerned, the main judgment was rendered by the Division Bench of the High Court holding that the aforesaid Act as well as the earlier Ordinance which preceded the same in so far as they sought to apply the scheme of reservation of posts for governing recruitment of persons other than the District Judges to the Judicial Service of the State were ultra vires Article 234 of the Constitution. As the controversies involved in these appeals have to be resolved in the light of the relevant Constitutional scheme, by an earlier Order dated 13th May, 1994 of this Court, they were directed to be listed before a Constitution Bench. Subsequently in view of the statement made by learned counsel that the matter could be disposed of by a Bench of three Judges, the matters were directed to be placed before a three-Judge Bench by an order dated 12th May, 1995. Thereafter a three-Judge Bench of this Court by its order dated 6th November, 1997 felt that the matters raised questions regarding interpretation of provisions of Articles 233, 234 and 309 of the Constitution and hence it would be appropriate that they are heard by the Constitution Bench. That is how these matters have been placed before this Constitution Bench under the directions of Honble the Chief Justice of India. Before we proceed to deal with the rival contentions of learned counsel for the respective parties in support of their cases, it becomes necessary to note a few introductory facts. Facts leading to Civil Appeal No.9072 of 1996: This Court, by its order dated 13th October, 1993 in Civil Appeal Nos. 4561-62 of 1992 in State of Bihar vs. Madan Mohan Singh & Ors., had quashed the earlier advertisement for filling up the vacancies of Additional District Judges in the District Judicial Service of Bihar and directed the appellant State to fill up the same through a fresh advertisement. In the mean time, it appears that as the High Court had not agreed to the suggestion of the State authorities to have reservation in the posts of District Judges for reserved category of candidates and had insisted on proceeding with the recruitment as per the 1951 Rules, styled as the Bihar Superior Judicial Service Rules, 1951, which were framed by the Governor of Bihar in exercise of the powers conferred by the proviso to Article 309 read with Article 233 of the Constitution of India and which Rules did not provide for any such reservation, the Governor of Bihar issued the impugned Ordinance which subsequently became the impugned Act by which the scheme of 50% reservations for reserved category of candidates was directed to be applied while effecting direct recruitment to the posts concerned. On 16th November, 1993, the

> appellant State requested the High Court to effect recruitment to the vacancies in the cadre of District Judges on the basis of the reservation provided by the Ordinance which subsequently was followed by the Act.

By its communication dated 16th December, 1993, the High Court of Patna insisted that recruitment to District Judiciary can be made on the basis of 1951 Rules only. By a communication dated 5th April, 1994, the High Court informed the authorities concerned that no reservation of posts in the district cadre could be implemented and while making appointments from the members of the Bar for direct recruitment, preference may be given to the Scheduled Caste (for short SC) and Scheduled Tribe (for short ST) candidates who are of equal merit with general category candidates. On 7th April, 1994, the High Court intimated that there are 54 vacancies in the district cadre which had to be filled up. The State Government, however, issued the impugned advertisement of 16th June, 1994 by which 50% of the available vacancies of District Judges were sought to be filled in from reserved category of candidates and the remaining 50% posts thereof, i.e. 27, were to be filled in by the open category candidates. It is this advertisement which was challenged by the writ petitioners before the High Court. The High Court, by the impugned judgment as noted earlier, has allowed the writ petition and quashed the condition of reservation sought to be imposed by the impugned advertisement.

Facts leading to Civil Appeal arising out of S.L.P.(C) No.16476 of 1993: By a proposal dated 30th January, 1991, the appellant-State consulted the Bihar Public Service Commission regarding making provision for reservation of posts in the Subordinate Judicial Service for reserved category of candidates. The said proposal of the appellant-State was also placed for consideration of the High Court but it was not accepted by the High Court by its communication dated 16th April, 1991, and that resulted in the impugned Ordinances, being 33 and 34 of 1991, which were followed by the impugned Act. The original writ petitioners, who had already appeared at the competitive examination in April, 1991 moved the High Court challenging the Ordinances and the latter Act in so far as the scheme of 50% reservation of posts for direct recruitment at grass root level of the State Judiciary was concerned. As noted earlier, the aforesaid writ petition was allowed and relief was granted against the appellants. Rival contentions:

> Dr.Dhavan, learned senior counsel appearing for the appellant-State in Civil Appeal No.9072 of 1996, at the outset, contended that the impugned Act, especially Section 4 thereof, is wrongly held by the High Court to be not applicable to Judicial Services of the State. He contended that Judicial Services especially, the Subordinate Judiciary comprising of district cadre and the cadre of Judges below the same were part and parcel of the Public Services of the State and, therefore, on the express terminology of the Act, Section 4 thereof, became directly applicable to the recruitment of judicial officers both at the district level as well as at the level of Subordinate Judiciary below it.

Alternatively, it was submitted that even assuming that the Act did not apply on its own language, even then, it has to be held that the State Legislature was perfectly competent to enact provisions regarding reservation of posts in Judicial Services of the State in the light of Article 16(4) of the

Constitution of India read with the relevant entry 41 in list II of Seventh Schedule to Constitution. He also posed the moot question whether the State Legislature has independent power to enact any provisions regarding reservation in connection with appointment in Judiciary when such reservation, after consultation with the High Court, could not get reflected in the relevant Rules framed by the Governor under Article 309 read with Articles 233 and 234 of the Constitution of India. In support of these contentions, relevant Constitutional scheme was pressed in service. It was submitted that on a correct interpretation of Article 309 the State Legislature as well as the Governor had ample jurisdiction to make provision for reservation in connection with Judicial Service. Under the said Article, paramount power in this connection has been vested in the State Legislature. He then referred to Articles 233 and 234 in connection with Subordinate Judiciary and placed emphasis on Article 236 (b) defining the expression Judicial Service as a service consisting exclusively of persons intended to fill the post of District Judge and other civil judicial posts inferior to the post of District Judge. He submitted that all that the opening part of Article 309 provides is to the effect that, while making appointments to the cadre of District Judges or Subordinate Judges of lower judiciary, as per Articles 233 and 234, consultation of the Governor with the High Court is necessary. That apart, from these latter two Articles there is no fetter on the power of the State Legislature to enact appropriate legislation in this connection under Article 309. He invited our attention to List II entry 41 of the Seventh Schedule for submitting that the State Legislature is competent to make enactment in connection with appointments to Public Services and Judicial Service is also a Public Service of the State. He further submitted that the first part of Article 309 does not attract Article 234 so far as State Legislatures paramount powers are concerned.

Dr.Dhavan, relying upon the second part of Article 235, stated that despite the full control of District Judiciary being vested in the High Court, the right of appeal and other conditions of service of Members of Subordinate Judiciary as laid down by any competent law which would include legislative enactment as well as statutory rules are clearly saved pro tanto at least at the second level, after appointments are made at the grass-root level in the Judiciary and when the further question arises as to how the conditions of service of such appointees are to be governed and controlled. Dr.Dhavan, therefore, submitted that it is not as if the power of State Legislature to enact appropriate provisions is totally excluded because of the enactment of Articles 233 to 235. Dr.Dhavan tried to highlight his submission by contending that if the power of State Legislature to enact appropriate provisions regarding appointments of Members of Subordinate Judiciary is held totally excluded by Article 234, and to that extent Article 309 be held out of picture, then the following anomalies may arise in the working of these provisions.

1) Judicial Service as defined by Article 236(b) will get truncated in its operation.

2) The second anomaly pointed out by Dr.Dhavan was that power to legislate, which must be given full effect, would get excluded without there being any express exclusion.

3) The third anomaly pointed out by Dr.Dhavan was that though under the Constitution, the scheme of separation of power is devised to separate the Executive from the Judiciary, this scheme does not extend to oust the legislative power. If it is

held that Article 234 ousts the legislative power for making suitable enactments on the topic covered therein then, to that extent, an anomalous position would arise not contemplated by the Constitutional scheme.

Dr.Dhavan next contended that on the express language of Article 234, only the rule making power of the Governor is fettered but not the legislative power of the State.

Dr.Dhavan next submitted that if legislative interference in the process of selection and appointment of direct recruits to Subordinate Judiciary as per Article 234 is completely ruled out that being the first level or the grass-root level of the Subordinate Judiciary then another patently anomalous situation would arise. That under Article 235 second part such statutory provisions to be enacted by competent Legislature are clearly contemplated so far as conditions of service of judicial officers are concerned and then when we turn to the apex level, namely, of the district cadre manned by District Judges there is no express ouster of legislative interference under Article

233. Thus the plenary power of the Legislature would be operative qua the highest posts in the hierarchy of District Judiciary while for the grass-root level it will be ruled out. Dr.Dhavan then invited our attention to the decisions in M.M.Gupta & Ors. etc. vs. State of Jammu & Kashmir & Ors., (1982) 3 SCC 412 paras 28 to 32 as well as in State of Kerala vs. Smt.A.Lakshmikutty & Ors., (1986) 4 SCC 632 at page 647 in para 22 to highlight the scope of the term consultation which should be effective consultation. He then invited our attention to the impugned Act especially Sections 2 (c), 4 and 16 having overriding effect over all other rules in force and submitted that such establishments under the State would include even Judiciary as laid down by the definition of Section 2(n). He, however, fairly conceded that neither in the Rules of 1951 regarding appointments to district cadre as per Article 233 nor under the Rules of 1955 for recruitment to cadre of Subordinate Judiciary as laid down by Article 234, there is any provision for 50% reservation of posts and, therefore, he submitted that this entire case depends upon competence of the impugned Act which had to be enacted because there was a stalemate on this subject as the High Court did not agree with the suggestion of the Governor for suitable amendment to these Rules under Articles 233 and 234. He ultimately submitted, that the reasoning of the High Court that the Act does not cover Judicial Service is patently erroneous and that this Act is not bound by any fetters of Articles 233 or 234 and is an exercise of paramount legislative power conferred on the State authorities under Article 309 first part read with entry 41 List II of Seventh Schedule of the Constitution. He, therefore, submitted that the Act must be permitted to have full play.

In support of his contentions Dr.Dhavan placed strong reliance on the decision of a Constitution Bench of this Court in the case of B.S.Yadav & Ors. v. State of Haryana & Ors. etc. (1981) 1 SCR 1024. Dr.Dhavan, therefore, submitted that the impugned judgment of the High Court, being contrary to the Constitutional scheme, requires to be set aside.

Shri Dwivedi, learned senior counsel appearing for the appellant-State in the companion Civil Appeal submitted that though the High Court in para 9 at page 11 has referred to a three-Judge Bench judgment of this Court in All India Judges Association & Ors. etc. vs. Union of India & Ors. etc., AIR 1993 SC 2493, giving special status to judicial officers, the said observations cannot whittle

down the power of reservation available to the State authorities under Article 16 (4) and that question was not examined in the said case as it did not fall for consideration. He submitted that a conjoint reading of Sections 2(c) and 2(n) clearly shows that the Act is meant to apply also to Judicial Service of the Bihar State. He next contended that question of reservation of posts in a cadre which is already established by the State authorities in exercise of their powers under Article 309 is not covered by Articles 233 to 235. That question is covered by Article 16 sub-article (4) and none of the aforesaid provisions curtail that enabling power available to the State authorities. In this connection, he also invited our attention to entry 11A of List III of Seventh Schedule to the Constitution dealing with constitution and organisation of all courts, except the Supreme Court and the High Courts, and submitted that scheme of reservation of posts would remain sustained under these provisions and also as per the Legislature enacted under entry 41 of List II. He submitted that once the court is constituted, it would comprise of all cadres of judicial officers to man the courts and the formation of cadres and constitution of the courts also permitted provisions for creation of reserved posts to comprise in such cadres. This exercise has nothing to do with the question of appointment on available vacancies in posts borne on established cadres in Judicial Service. According to Shri Dwivedi, the establishment of cadres and creation of posts in the cadres is a stage prior to the one contemplated by Articles 233 to 235 dealing with the subsequent question as to how actual appointments of deserving candidates are to be effected to fill up vacancies in already created posts in the concerned cadres. In short, the submission of Shri Dwivedi was that question of creation of posts to be filled up by reserved candidates or open category candidates was in the domain of the State authorities especially, the Legislature which can enact appropriate statutory provisions in discharge of constitutional obligation under Article 16(4) read with entry 41 of List II of Seventh Schedule as well as entry 11 A of List III and once the general category posts as well as the reserved category posts are made available to the High Court for being filled in, thereafter, it will be for the High Court to proceed according to Articles 233 and 234 of the Constitution of India and in that exercise the State Legislature will have no say. He, therefore, contended that the High Court in the impugned judgment was patently in error in taking the view that statutory provision of reservation of posts for reserved category candidates in the Subordinate Judiciary under its control was in any way ultra vires or illegal. Shri Dwivedi, in support of his contentions, gave written submissions whereby, amongst others, he invited our attention to Article 320 sub-article (4) which excludes reservation expressly from the powers and functions of the Public Service Commission. He submitted that Article 234 requires the Governor for framing rules to consult the High Court as well as the Public Service Commission and when it cannot make any provision regarding reservation under Article 16 sub-article (4), by analogy, consultation of the High Court also under the very same Article 234 would not permit the High Court to deal with Article 16 sub- article (4). In other words, question of reservation is outside the ken of Article 234. Shri Dwivedi, also in support of his contentions, placed reliance on various decisions of this Court to which we will make a reference at an appropriate stage. Shri Dwivedi next contended that even under the Bihar Judicial Service (Recruitment) Rules, 1955 (hereinafter referred to as the 1955 Rules) especially, Rules 19 & 20 reservation of posts in lower judiciary is contemplated; that these Rules are made by the Governor in consultation with the High Court and the Public Service Commission.

Shri Dwivedi next contended that, in any case, the High Court in the impugned judgement was not called upon to consider the further question whether there cannot be any reservation to the posts in

district cadre and the stand of the High Court that if candidates of equal merit are there, then preference can be given to SC and ST candidates, was correct or not. That the only question before the High Court was whether the impugned Act could validly apply to provision of reservation of posts in the District Judiciary. He, therefore, submitted that the observations in para 24 of the impugned judgment, in any case, are required to be set aside as redundant and uncalled for. It was accordingly submitted by Shri Dwivedi that the appeal deserves to be allowed.

Learned counsel appearing for the Intervenors in I.A.No.20, on the other hand, tried to support the case of reservation for SC and ST candidates relying on Rule 20 of 1955 Rules so far as the recruitment to Subordinate Judiciary was concerned. Learned counsel for the intervenors in I.A.No.10 representing Other Backward Class (for short OBC) candidates adopted the arguments of Dr.Dhavan and Shri Dwivedi in support of the impugned Act and the scheme of reservation thereunder. Learned counsel appearing for the Intervenors as per I.A.No.11 tried to support reservation for SC and ST candidates under the Act and even dehors it. While intervenor in I.A.Nos. 4 and 9 representing general category candidates supported the decision of the High Court. The main reply to the contentions of learned counsel for the appellants emanated from learned senior counsel Shri Thakur appearing for the High Court of Patna. He submitted, in the first instance, that the impugned Act is not wide enough to apply to Judiciary. He tried to support this contention on the basis of reasoning which appealed to the High Court in the impugned judgment. He alternatively contended that Section 4 of the impugned Act, if applied to judicial officers, will ex facie become invalid being repugnant to the composite scheme of Articles 233 to 235. To highlight this alternative contention, he contended as under : 1. Article 309 has no application to Subordinate Judiciary. It gets excluded by the triology of Articles 233 to 235 which represent a complete Code amongst themselves. 2. Once Article 309 is excluded, legislative power under Article 309 first part also gets excluded qua the field covered by the aforesaid triology of the Articles. 3. These three Articles themselves are the only source of power to make rules or law as seen from second part of Article 235 as well as Articles 233 and 234. 4. Rules made under Article 234 by the Governor after following the procedure laid down thereunder would relate to service also as contemplated by Article 233. 5. Second part of Article 235 only can permit suitable legislation by the State authorities governing the conditions of service of already recruited judicial officers whether at the grass-root level or even at the apex level of the District Judiciary in exercise of its legislative power under Article 309 read with entry 41 of List II of the Seventh Schedule. In order to support his contention that Article 309 does not apply to recruitment to the Judicial Service, he invited our attention to Article 187 dealing with Secretarial Staff of Legislature, Article 148 dealing with Service regulations of the Comptroller & Auditor- General of India, Article 146 dealing with Service under the Supreme Court, Article 229(2) dealing with Services under the High Court and Article 324(5) dealing with Service regulations of Election Commission and submitted that in all these Articles, special provisions are made for enacting appropriate rules and even statutes covering the topics mentioned therein. But so far as Article 234 is concerned, it is not subject to the law of Legislature as found in the aforesaid other Articles. To a pointed query by us Shri Thakur, learned senior counsel for the High Court of Patna, after taking appropriate instructions, submitted that in principle the High Court of Patna has already accepted reservation of 14% posts for SC and 10% for ST candidates for being recruited at the lowest level of the District Judiciary. Shri Thakur also placed reliance on decisions of the various High Courts and of this Court to which we will make a reference at an appropriate stage. Shri

Thakur, further submitted that Section 4 of the impugned Act, in express terms, seeks to regulate appointments to the existing posts in the cadre of District Judiciary as well as in the Subordinate Judiciary. To that extent it directly impinges upon the provisions of Articles 233 and 234, which amongst them, represent a complete Code in connection with appointment to Subordinate Judiciary. He further submitted that it is fallacious to contend that reserving posts for a given class of candidates would be at a stage prior to the question of recruitment and appointment as contemplated by Articles 233 and 234 of the Constitution. That once posts are already created for being filled up in a given cadre the authority of the State in this connection would come to an end. For creation of such cadres and sanction of posts appropriate legislation can be enacted or even the Governor, in exercise of his independent power under Article 309, can promulgate Rules. But once posts are already created in a Judicial Cadre and when the question of filling up vacancies in the existing sanctioned posts in district cadre or subordinate cadre arises, direct recruitment has to be done on the recommendation of the High Court as laid down by Article 233 (2) and recruitment in the vacancies in the cadre of Subordinate Judiciary has to be done as per the 1955 Rules framed by the Governor in consultation with the High Court under Article 234 and in no other manner. That for regulating this process there is no question of any legislative interference by exercise of any paramount power. He, therefore, contended that the view of the High Court in the impugned judgment is well sustained on the Constitutional scheme and calls for no interference. He, however, fairly submitted that so far as the 1955 Rules are concerned, by the consent of the High Court the rule making power has been exercised by the Governor permitting the reservation for SC and ST candidates in recruitment governed by the said Rules and which recruitment has to be resorted to for filling up vacancies in posts of Subordinate Judges and the Munsiffs. He also fairly stated that the High Court is consistently following the provision of reservation for direct recruitment in these categories of posts to the extent of 14% being reserved for SC and 10% being reserved for ST candidates but nothing more. So far as the impugned Act is concerned, it goes far beyond this permitted scheme of reservation under the relevant Rules of 1955 and seeks to impose a blanket reservation of 50% for SC, ST and OBC candidates. That such a statutory provision flies in the face of Articles 233 and 234 of the Constitution of India and cannot be sustained and accordingly rightly been voided by the High Court. Points for determination: In the light of the aforesaid rival contentions, the following points arise for our determination: 1. Whether the impugned Act of 1991 on its express language covers Judicial Service of the Bihar State; 2. If the answer to point no.1 is in the affirmative, whether the provisions of the impugned Act, especially, Section 4 thereof in its application to Subordinate Judiciary would be ultra vires Articles 233 and 234 of the Constitution of India and hence cannot be sustained; 3. In the alternative, whether the aforesaid provisions of the Act are required to be read down by holding that Section 4 of the Act will not apply to direct recruitment to the posts comprised in the Bihar Superior Judicial Service as specified in the Schedule to the Bihar Superior Judicial Service Rules, 1951 as well as to Bihar Judicial Service governed by the Bihar Judicial Service (Recruitment) Rules, 1955, comprising of the posts of Subordinate Judges and Munsiffs under the District Judiciary; and 4. What final order?

Before we deal with the aforesaid points for determination, it will be necessary to keep in view the relevant provisions of the Constitution which have a direct impact on the resolution of the controversy projected by these points. Constitutional Scheme: Part XIV deals with Services under the Union and the States. Chapter I comprising of Articles 308 to 313 deals with Services, while

Chapter II covering Articles 315 to 323 deals with Public Service Commissions. Article 308 defines the expression State, which shall not include the State of Jammu & Kashmir. However, the relevant Article for our present purpose is Article 309 which reads as under : 309. Recruitment and conditions of service of persons serving the Union or a State Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

> Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the Provisions of any such Act.

A mere look at this Article shows that it is expressly made subject to other provisions of the Constitution and subject to that, an appropriate Legislature or Governor can regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State concerned. Proviso to that Article permits the Governor of the State to fill up the gap, if there is no such statutory provision governing the aforesaid topics. For that purpose, the Governor may make rules regulating the recruitment and the conditions of service of persons appointed to such services and posts until provision in that behalf is made by or under an Act of the competent Legislature which may intervene and enact appropriate statutory provisions for the same. The manner of recruitment to the services contemplated by Article 309 is provided by Chapter II dealing with the Public Service Commissions. Article 320 deals with Functions of Public Service Commissions enjoining them to conduct examinations for appointment to the services of the Union and the services of the State respectively. That naturally has a direct linkage with the types of Services contemplated by Article 309. Special Scheme for Judicial Services in Part VI (Chapters V & VI):

It is pertinent to note that independently of general provisions of Article 309, the Constitution has made special provisions for certain Services. Even if they may be part of public services, still separate Constitutional schemes are envisaged for regulating recruitment and conditions of services of officers governed by such Services. Let us have a glance at such specially dealt with Services. Part VI of the Constitution dealing with the States, separately deals with the executive in Chapter II, the State Legislature under Chapter III and thereafter Chapter IV dealing with the Legislative Powers of the Governor and then follows Chapter V dealing with the High Courts in the States and Chapter VI dealing with the Subordinate Courts. It is in Chapter VI dealing with the Subordinate Courts that we find the provision made for

appointment of District Judges under Article 233, recruitment of persons other than the District Judges to the Judicial Services under Article 234 and also Control of the High Court over the Subordinate Courts as laid down by Article 235. Article 236 deals with the topic of Interpretation and amongst others, defines by sub- article (b) the expression judicial service to mean a service consisting exclusively of persons intended to fill the post of District Judge and other civil judicial posts inferior to the post of District Judge. It becomes, therefore, obvious that the framers of the Constitution separately dealt with Judicial Services of the State and made exclusive provisions regarding recruitment to the posts of District Judges and other civil judicial posts inferior to the posts of the District Judge. Thus these provisions found entirely in a different part of the Constitution stand on their own and quite independent of part XIV dealing with Services in general under the State. Therefore, Article 309, which, on its express terms, is made subject to other provisions of the Constitution, does get circumscribed to the extent to which from its general field of operation is carved out a separate and exclusive field for operation by the relevant provisions of Articles dealing with Subordinate Judiciary as found in Chapter VI of Part VI of the Constitution to which we will make further reference at an appropriate stage in the later part of this judgment. We may also refer at this stage to Article 146 dealing with Services under the Supreme Court which lays down the procedure for appointment of officers and servants of the Supreme Court and provides under sub-article (2) thereof that subject to the provisions of any law made by Parliament, the conditions of service of officers and servants of the Supreme Court shall be such as may be prescribed by rules made by the Chief Justice of India or by some other Judge or officer of the court authorised by the Chief Justice of India to make rules for the purpose. Similar provision is found in Article 229 dealing with recruitment of officers and servants and the expenses of the High Courts. Sub-article (2) there of lays down the rule making power of the Chief Justice of the Court concerned or by some other Judge or officer of the Court authorised by the Chief Justice to make rules for the purpose subject to the provisions of any law made by any Legislature of the State. Article 148 deals with Comptroller and Auditor-General of India. Sub-article (5) thereof deals with rule making power of the President regarding the conditions of service of persons serving in the Indian Audit and Accounts Department and the administrative powers of the Comptroller and Auditor-General subject to any provisions of the Constitution or any law made by the Parliament in this connection. Article 98 deals with Secretariat of Parliament. Sub- article (3) thereof provides Until provision is made by Parliament under clause (2), the President may, after consultation with the Speaker of the House of the People or the Chairman of the Council of States, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the House of the People or the Council of States, and any rules so made shall have effect subject to the provisions of any law made under the said clause. Similarly, for Secretariat of State Legislature, we find Article 187 which deals with separate secretariat staff for the House or each House of the Legislature of a State. Sub-article (3) thereof runs parallel to sub-article (3) of Article 98 and provides that until provision is made by

the Legislature of the State under clause (2), the Governor may, after consultation with the Speaker of the Legislative Assembly or the Chairman of the Legislative Council, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the Assembly or the Council and any rules so made shall have effect subject to the provisions of any law made under the said clause. Article 324 is found in Part XV which deals with Superintendence, direction and control of elections to be vested in an Election Commission. Sub-article (5) thereof provides that subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine. The aforesaid Constitutional provisions clearly indicate that independently of general provisions regarding Services as mentioned in Part XIV, different types of Services contemplated by the Constitution in other parts have their own procedural schemes for recruitment and regulation of conditions of these Services and therefore, Article 309 found in Part XIV necessarily will have to be read subject to these special provisions regarding recruitment and conditions of services of diverse types governed by the relevant different Constitutional provisions as indicated herein above. The other Article to which reference is to be made is Article 16 sub-article (4) of the Constitution which enables the State to make provision for reservation of appointments or posts in favour of any backward class of citizens which, in its opinion, is not adequately represented in the services under the State. This provision has to be read with Article 335 which deals with Claims of Scheduled Castes and Scheduled Tribes to services and posts and lays down that the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State. Though on the express language of Article 335, the Other Backward Classes are not included, it is now well settled by a decision of the nine-member Constitution Bench of this Court in the case of Indra Sawhney & Ors. vs. Union of India & Ors., [1992 Suppl. (3) SCC 217] that even the Other Backward Classes are also covered by the thrust of Article 335 of the Constitution of India and that view is reaffirmed and is followed by a recent decision of the three-Judge Bench of this Court in IAs. Nos.35-36 in WP (C) No.930 of 1990 etc. in Indra Sawhney vs. Union of India & Ors. reported in (2000) 1 SCC 168, wherein Jagannadha Rao, J., speaking on behalf of the three-Judge Bench highlighted this very position. Thus, even if under Article 16(4) the State proposes to provide reservation on the ground of inadequate representation of certain backward classes in Services, if it is considered by the appropriate authority that such reservation will adversely affect the efficiency of the administration, then exercise under Article 16(4) is not permissible. This is the Constitutional limitation on the exercise of the enabling power of reservation under Article 16(4). As we shall presently show, question whether in the Subordinate Judiciary covered by Articles 233 and 234 if reservation is provided, then the efficiency of the judicial administration will be affected, is a matter within the exclusive purview of the High Court which shall have to be consulted. Such

> consultation is a Constitutional obligation before any Rules are made for reservation. Before parting with the resume of relevant Constitutional provisions, we may also refer to Article 50 which lays down the Directive Principles of State Policy that the State shall take steps to separate the judiciary from the executive in the public services of the State.

Legislative powers under Articles 245, 246 are subject to other provisions, including Articles 233, 234 and 235:

> We may also refer to Part XI of the constitution, especially Chapter I dealing with Legislative Relations laying down the Distribution of Legislative Powers. Article 245 deals with Extent of Laws made by Parliament and by the Legislatures of States. Sub-article (1) thereof provides that Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. Thus, the legislative powers of Parliament and the Legislature of the State are expressly made subject to other provisions of the Constitution. Similarly, Article 246 laying down the category of subject-matter of laws made by Parliament and by the Legislatures of States enumerated in Lists I, II and III of the Seventh Schedule will also have to be read subject to Article 245. Meaning thereby, if other provisions of the Constitution cut down or exclude the Legislative powers of Parliament or State Legislature qua given topics, then those other provisions have to be given their full play and effect.
>
> Articles 233, 234 and 235: So far as recruitment to District and Subordinate Judiciary is concerned, we have therefore, to turn to the twin Articles found in Chapter VI of Part VI dealing with Subordinate Courts. The relevant two articles read as under : 233. Appointment of Judges:
>
> (1) Appointment of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.
>
> (2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

234. Recruitment of persons other than district judges to the judicial service: 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. (Emphasis supplied) Article 233 dealing with appointment of District Judges, on its own express terminology projects a complete scheme regarding the appointment of persons to District Judiciary as District Judges. In the present appeals, we are concerned with direct recruitment to the cadre of District Judges and hence sub-article (2) of Articles 233 becomes relevant. Apart from laying down

the eligibility criterion for candidates to be appointed from the Bar as direct District Judges the said provision is further hedged by the condition that only those recommended by the High Court for such appointment could be appointed by the Governor of the State. Similarly, for recruitment of judicial officers other than District Judges to the Judicial Service at lower level, complete scheme is provided by Article 234 wherein the Governor of the State can make such appointments in accordance with the rules framed by him after consulting with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State. So far as the Public Service Commission is concerned, as seen from Article 320, the procedure for recruitment to the advertised posts to be followed by it is earmarked therein. But the role of the Public Service Commission springs into action after the posts in a cadre are required to be filled in by direct recruitment and for that purpose due intimation is given to the Commission by the State authorities. They have obviously to act in consultation with the High Court so far as recruitment to posts in Subordinate Judiciary is concerned. Of course, it will be for the High Court to decide how many vacancies in the cadre of District Judges and Subordinate Judges are required to be filled in by direct recruitment so far as the District Judiciary is concerned and necessarily only by direct recruitment so far as Subordinate Judiciary is concerned. This prime role of the High Court becomes clearly discernible from Article 235 which deals with the control of the High Court over the Subordinate Judiciary and also of Subordinate Courts. The said Article provides as under: 235. Control over subordinate courts. The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may 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.

It is in the light of the aforesaid relevant scheme of the Constitution that we now proceed to tackle the main controversy posed for our consideration. Point No.1: So far as this point is concerned, it is strictly not necessary for us to go into the reason or the cause which led the appellant-State to resort to the exercise of legislative power for enacting the impugned Act. The question is whether the Act, as enacted, by its express language, can apply to judicial service of the State or not. When we turn to this Act, we find that it is enacted to provide for adequate representation of SC, ST and OBC candidates in Posts and Services under the State. The State is defined by Section 2(n) to include the Government, the Legislature and the Judiciary of the State of Bihar and all local or other authorities within the State or under the control of the State Government. Consequently, it cannot be said that the Act, as framed, did not seek to cover the Judiciary of the State of Bihar. The main provision of the Act, which is on the anvil of controversy, is Section 4 which reads as under : 4. Reservation for direct recruitment All appointments to services and posts in an establishment which are to be filled by direct recruitment shall be regulated in the following manner, namely :- (1) The available vacancies shall be filled up (a) from open merit category .. .. 50% (b) from reserved category .. .. 50% (2) The vacancies from different categories of reserved candidates from amongst the 50% reserved category shall, subject to other provisions of this Act, be as follows :- (a) Scheduled Castes .. .. 14% (b) Scheduled Tribes .. .. 10% (c) Extremely Backward Class .. .. 12% (d) Backward Class .. .. 8% (e) Economically Backward Woman .. 3% (f) Economically Backward .. .. 3% ----- Total .. 50% ----

Provided that the State Government may, by notification in the official Gazette, fix different percentage for different districts in accordance with the percentage of population of Scheduled Castes/Scheduled Tribes and Other backward classes in such districts: Provided further that in case of promotion, reservation shall be made only for Scheduled Castes/Scheduled Tribes in the same proportion as provided in this section. (3) A reserved category candidate who is selected on the basis of his merit shall be counted against 50% vacancies of open merit category and not against the reserved category vacancies. (4) Notwithstanding anything contained to the contrary in this Act or in any other law or rules for the time being in force, or in any judgement or decree of the Court, the provision of sub-section (3) shall apply to all such cases in which all formalities of selection have been completed before the 1st November 1990, but the appointment letters have not been issued. (5) The vacancies reserved for the Scheduled Castes/Scheduled Tribes and other Backward Classes shall not be filled up by candidates not belonging to Scheduled Castes/Scheduled Tribes and Other Backward Classes except as otherwise provided in this Act. (6) (a) In case of non-availability of suitable candidates from the Scheduled Castes and Scheduled Tribes for appointment and promotion in vacancies reserved for them, the vacancies shall continue to be reserved for three recruitment years and if suitable candidates are not available even in the third year, the vacancies shall be exchanged between the Scheduled Castes and Scheduled Tribes and the vacancies so filled by exchange shall be treated as reserved for the candidates for that particular community who are actually appointed. (b) In case of non-availability of suitable candidates from the Extremely Backward Classes and Backward Classes the vacancies so reserved shall continue to be reserved for them for three recruitment years and if suitable candidates are not available even in the third year also, the vacancies shall be filled by exchange between the candidates from the extremely Backward and Backward Classes and the vacancies so filled by Exchange shall be treated as reserved for the candidates of that particular community who are actually appointed. (c) In case of non-availability of suitable candidates for the vacancies reserved for the economically backward women the vacancies shall be filled first by the candidates from the Scheduled Castes, then by the candidates from the Scheduled Tribes, then by the candidates from extremely backward class, and then by the candidates from backward class. The vacancies so filled in the transaction shall be treated as reserved for the candidates of that particular community who are actually appointed. (d) If in any recruitment year, the number of candidates of Scheduled Castes/Scheduled Tribes, extremely Backward and Backward Classes are less than the number of vacancies reserved for them even after exchange formula the remaining backlog vacancies may be filled by general candidates after dereserving them but the vacancies so dereserved shall be carried forward for three recruitment years.

(e) If the required number of candidates of Scheduled Castes, Scheduled Tribes and Extremely Backward and Backward Classes are not available for filling up the reserved vacancies, fresh advertisement may be made only for the candidates belonging to the members of Scheduled Castes, Scheduled Tribes and Extremely Backward and Backward Classes, as the case may be, to fill the backlog vacancies only.

A bare reading of the said provision shows that all appointments to services and posts in any establishment by way of direct recruitment require to be subjected to reservation so that all available vacancies have to be filled in from open category candidates only up to 50% and from reserved

category up to remaining 50%. It cannot be disputed that posts of District Judges and Judges subordinate to the District Judiciary are also posts in Judicial Service. Question is whether the phrase posts in any establishment governs such judicial posts. We have, therefore, to turn to the definition of the term establishment as found in Section 2(c) of the Act. The relevant provision thereof lays down that establishment means any Office or department of the State concerned with the appointments to public services and posts in connection with the affairs of the State. On a conjoint reading of the definition of State under Section 2(n) and the definition establishment under Section 2(c), the following statutory scheme emerges. Any office or establishment of the Judiciary of the State of Bihar concerned with the appointments to public services and posts in connection with affairs of the Judiciary of the State of Bihar would fall within the sweep of the term establishment. Once that conclusion emerges from the scheme of the Act, it becomes obvious that all appointments to services and posts in any office or department of the Judiciary of the State of Bihar would be covered by the sweep of Section 4. On the aforesaid scheme of the Act, the High Court in the impugned judgment, has taken the view that the operation of Section 4 for offices or departments of the Judiciary of the State of Bihar would cover only the ministerial staff of the District Courts and courts subordinate thereto and would not include Presiding Officers and therefore, Section 4 will not govern the direct recruitment to the posts of Presiding Officers of the District Judiciary as well as of Subordinate Judiciary. It is difficult to appreciate this line of reasoning on the express language of the relevant provisions of Section 4 read with the definition provisions. It becomes obvious that the term any office of the Judiciary of the State of Bihar would naturally include not only ministerial staff but also officers, including Presiding Officers of courts comprised in the Judiciary of the State. Once that conclusion is reached on the express language of the relevant provisions of the Act, it cannot be held that the thrust of Section 4 would not apply to govern reservation for direct recruitment to the posts of Presiding Officers in the District Courts as well as courts subordinate thereto, as all of them will form part and parcel of the Judiciary of the State of Bihar and will have to be treated as holders of offices in the State Judiciary. Consequently, it is not possible to agree with the contention of learned senior counsel Shri Thakur for the High Court that on the express provisions of the Act, Section 4 cannot apply to govern recruitment to posts in Subordinate Judiciary. The first point for determination, therefore, has to be answered in the affirmative in favour of the appellants and against the respondents.

Point No.2: Since it is held that Section 4 of the impugned Act, on its express terms, covers direct recruitment to posts in the cadre of District Judiciary as well as to Subordinate Judiciary in the State of Bihar, moot question arises as to whether Section 4 can be sustained on the touchstone of the relevant Constitutional scheme governing the recruitment and appointments to these posts. For coming to the grip of this problem, we have to keep in view the salient features of the Constitution emanating from the Directive Principles of State Policy as laid down by Article 50 which underscores the felt need of separation of the Judiciary from the Executive. For achieving that purpose, the Constitution has made separate provisions regarding the recruitment and appointment to the cadre of District Judges as well as the Subordinate Judiciary as found in Chapter VI of Part VI of the Constitution and, as seen earlier, these provisions are conspicuously not included in part XIV dealing in general with Services under the Union and the States. Article 309 itself, which is of general nature, dealing with regulation of Recruitment and conditions of Service of persons serving in the Union or a State is expressly made subject to other provisions of the Constitution. The first

part of Article 235 itself lays down that it is for the High Court to control the District Courts and Courts subordinate thereto and in exercise of that control vesting in the High Court, regulation of posting and promotions and granting of leave to persons belonging to the Judicial Services has to be done by the High Court. It is, of course, true that in the second part of Article 235 judicial officers already appointed to the Service have their statutory right of appeal and the right to be dealt with regarding other service conditions as laid down by any other law for the time being in force, expressly protected. But these provisions of the second part only enable the Governor under Article 309, in the absence of any statutory enactment made by the competent Legislature for regulating the conditions of service of judicial officers who are already recruited and have entered and become part and parcel of the State service, to promulgate appropriate rules on the subject. But so far as the entry points are concerned, namely, recruitment and appointment to the posts of Presiding Officers of the courts subordinate to the High Courts, only Articles 233 and 234 would govern the field. Article 234 lays down the procedure and the method of recruiting judicial officers at grass-root level being Subordinate Judges and Munsiffs as laid down by the 1955 Rules. These Rules are also framed by the Governor of Bihar in exercise of his powers under Article 234 obviously after the consultation of the High Court and the Public Service Commission. Rules regarding the procedure of selection to be followed by the State Public Service Commission as found in Rules 4 to 17 deal with the method to be adopted by the Public Service Commission while selecting candidates who offer their candidature for the posts advertised to be filled in. These Rules obviously require consultation with the Commission on the procedural aspect of selection process. But so far as the High Court is concerned, its consultation becomes pivotal and relevant by the thrust of Article 233 itself as it is the High Court which has to control the candidates, who ultimately on getting selected, have to act as Judges at the lowest level of the Judiciary and whose posting, promotion and grant of leave and other judicial control would vest only in the High Court, as per Article 235 first part, once they enter the judicial service at grass-root level. Thus consultation of the Governor with the High Court under Article 234 is entirely of a different type as compared to his consultation with the Public Service Commission about procedural aspect of selection. So far as direct recruitment to the posts of District Judges is concerned, Article 233 sub-article (2) leaves no room for doubt that unless the candidate is recommended by the High Court, the Governor cannot appoint him as a District Judge. Thus Articles 233 and 234, amongst them, represent a well-knit and complete scheme regulating the appointments at the apex level of District Judiciary, namely, District Judges on the one hand and Subordinate Judges at the grass-root level of Judiciary subordinate to the district court. Thus Subordinate Judiciary represents a pyramidical structure. At base level i.e. grass- root level are the Munsiffs and Magistrates whose recruitment is governed by Article 234. That is the first level of the Judiciary. The second level represents already recruited judicial officers at grass-root level, whose working is controlled by the High Court under Article 235 first part. At the top of this pyramid are the posts of District Judges. Their recruitment to these posts is governed by Article 233. It is the third and the apex level of Subordinate Judiciary. It has also to be kept in view that neither Article 233 nor Article 234 contains any provision of being subject to any enactment by appropriate Legislature as we find in Articles 98, 146, 148, 187, 229(2) and 324(5). These latter Articles contain provisions regarding the rule making power of the concerned authorities subject to the provisions of the law made by the Parliament or Legislature. Such a provision is conspicuously absent in Articles 233 and 234 of the Constitution of India. Therefore, it is not possible to agree with the contention of learned counsel for the appellant-State that these Articles only deal with the rule making power of

the Governor, but do not touch the legislative power of the competent Legislature. It has to be kept in view that once the Constitution provides a complete Code for regulating recruitment and appointment to District Judiciary and to Subordinate Judiciary, it gets insulated from the interference of any other outside agency. We have to keep in view the scheme of the Constitution and its basic framework that the Executive has to be separated from the Judiciary. Hence, the general sweep of Article 309 has to be read subject to this complete Code regarding appointment of District Judges and Judges in the Subordinate Judiciary. In this connection, we have also to keep in view Article 245 which, in its express terms, is made subject to other provisions of the Constitution which would OBinclude Articles 233 and 234. Consequently, as these twin Articles cover the entire field regarding recruitment and appointment of District Judges and Judges of the Subordinate Judiciary at base level pro tanto the otherwise paramount legislative power of the State Legislature to operate on this field clearly gets excluded by the Constitutional scheme itself. Thus both Articles 309 and 245 will have to be read subject to Articles 233 and 234 as provided in the former Articles themselves. It is true, as submitted by learned senior counsel Shri Dwivedi for the appellant-State that under Article 16(4) the State is enabled to provide for reservations in Services. But so far as Judicial Service is concerned, such reservation can be made by the Governor, in exercise of his rule making power only after consultation with the High Court. The enactment of any statutory provision dehors consultation with the High Court for regulating the recruitment to District Judiciary and to Subordinate Judiciary will clearly fly in the face of the complete scheme of recruitment and appointment to Subordinate Judiciary and the exclusive field earmarked in connection with such appointments by Articles 233 and 234. It is not as if that the High Courts being constitutional functionaries may be oblivious of the need for a scheme of reservation if necessary in appropriate cases by resorting to the enabling provision under Article 16(4). The High Courts can get consulted by the Governor for framing appropriate rules regarding reservation for governing recruitment under Articles 233 and 234. But so long as it is not done, the Legislature cannot, by an indirect method, completely bypassing the High Court and exercising its legislative power, circumvent and cut across the very scheme of recruitment and appointment to District Judiciary as envisaged by the makers of the Constitution. Such an exercise, apart from being totally forbidden by the Constitutional scheme, will also fall foul on the concept relating to separation of powers between the legislature, the executive and the judiciary as well as the fundamental concept of an independent judiciary. Both these concepts are now elevated to the level of basic structure of the Constitution and are the very heart of the Constitutional scheme. In the case of His Holiness Kesavananda Bharati Sripadagalvaru vs. State of Kerala & Anr. etc.etc., (1973) 4 SCC 225, a twelve-member Constitution Bench of this Court had occasion to consider this question regarding the basic structure of the Constitution which, according to the Court, could not be tinkered with by the Parliament in exercise of its amending power under Article 368 of the Constitution. Sikri, CJ., in para 247 of the Report referred with approval the decision of the Judicial Committee in Liyanges case, (1967) 1 AC 259 for culling out the implied limitations on the amending power of the competent Legislature like the Parliament of Ceylon with which that case was concerned. The relevant observations are found in paras 253 to 255 of the Report at pages 357 and 358, which read as under :

> 253. The case, however, furnishes another instance where implied limitations were inferred. After referring to the provisions dealing with judicature and the Judges, the Board observed:

> These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitutions silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature.
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> 254. The Judicial Committee was of the view that there exists a separate power in the judicature which under the Constitution as it stands cannot be usurped or infringed by the executive or the legislature. The Judicial Committee cut down the plain words of Section 29(1) thus:
>
> Section 29(1) of the Constitution says.- Subject to the provisions of this Order Parliament shall have power to make laws for the peace, order and good government of the Island. These words have habitually been construed in their fullest scope. Section 29(4) provides that Parliament may amend the Constitution on a two-thirds majority with a certificate of the Speaker. Their Lordships however cannot read the words of Section 29(1) as entitling Parliament to pass legislation which usurps the judicial power of the Judicature-e.g., by passing an Act of attainder against some person or instructing a judge to bring in a verdict of guilty against someone who is being tried-if in law such usurpation would otherwise be contrary to the Constitution. (p.289)
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> 255. In conclusion the Judicial Committee held that there was interference with the functions of the judiciary and it was not only the likely but the intended effect of the impugned enactments, and that was fatal to their validity.

The ultimate conclusion to which Chief Justice Sikri reached are found in paras 292 to 294 at page 366 of the Report which read as under : 292. The learned Attorney-General said that every provision of the Constitution is essential; otherwise it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the constitution remains the same. The basic structure may be said to consist of the following features:

> (1) Supremacy of the Constitution; (2) Republican and Democratic form of Government; (3) Secular character of the Constitution; (4) Separation of powers between the legislature, the executive and the judiciary; (5) Federal character of the Constitution.

293. The above structure is built on the basic foundation, i.e., the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed.

294. The above foundation and the above basic features are easily discernible not only from the preamble but the whole scheme of the Constitution, which I have already discussed.

The other learned Judges constituting the Constitution Bench had nothing inconsistent to say in this connection. Thus separation of powers between the legislature, the executive and the judiciary is the basic feature of the Constitution. It has also to be kept in view that judicial independence is the very essence and basic structure of the Constitution. We may also usefully refer to the latest decision of the Constitution Bench of this Court in Registrar (Admn.), High Court of Orissa, Cuttack etc. vs. Sisir Kanta Satapathy (Dead) by LRs & Anr. etc., (1999) 7 SCC page 725, wherein K.Venkataswami, J., speaking for the Constitution Bench, made the following pertinent observations in the very first two paras regarding Articles 233 to 235 of the Constitution of India : An independent judiciary is one of the basic features of the Constitution of the Republic. Indian Constitution has zealously guarded independence of judiciary. Independence of judiciary is doubtless a basic structure of the Constitution but the said concept of independence has to be confined within the four corners of the Constitution and cannot go beyond the Constitution.

The Constitution Bench in the aforesaid decision also relied upon the observations of this Court in All India Judges Association & Ors.etc. (supra), wherein on the topic of regulating the service conditions of Judiciary as permitted by Article 235 read with Article 309, it had been observed as under : .the mere fact that Article 309 gives power to the executive and the legislature to prescribe the service conditions of the judiciary does not mean that the judiciary should have no say in the matter. It would be against the spirit of the Constitution to deny any role to the judiciary in that behalf, for theoretically it would not be impossible for the executive or the legislature to turn and twist the tail of the judiciary by using the said power. Such a consequence would be against one of the seminal mandates of the Constitution, namely, to maintain the independence of the judiciary.

In view of this settled legal position, therefore, even while operating in the permissible field of regulating other conditions of service of already recruited judicial officers by exercising power under Article 309, the concerned authorities have to keep in view the opinion of the High Court of the concerned State and the same cannot be whisked away. In order to fructify this Constitutional intention of preserving the independence of Judiciary and for fructifying this basic requirement, the process of recruitment and appointment to the District Judiciary with which we are concerned in the present case, is insulated from outside legislative interference by the Constitutional makers by enacting a complete Code for that purpose, as laid down by Articles 233 and 234. Consultation with the High Court is, therefore, an inevitable essential feature of the exercise contemplated under these two Articles. If any outside independent interference was envisaged by them, nothing prevented the founding fathers from making Articles 233 and 234 subject to the law enacted by the Legislature of States or Parliament as was done in the case of other Articles, as seen earlier. In the case of State of Kerala vs. Smt.A.Lakshmikutty & Ors., (1986) 4 SCC 632, a two member Bench of this Court, speaking through Sen,J., placing reliance on the Constitution Bench judgment of this Court in Chandra Mohan vs. State of U.P., (1967) 1 SCR 77, made the following pertinent observations in

paras 22 to 25 at pages 647-648, which read as under : 22. The heart of the matter is that consultation between the State Government and the High Court in the matter of appointment of District Judges under Article 233(1) of the Constitution must be real, full and effective. To make the consultation effective, there has to be an interchange of views between the High Court and the State Government, so that any departure from the advice of the High Court would be explained to the High Court by the State Government. If the State Government were simply to give lip service to the principle of consultation and depart from the advice of the High Court in making judicial appointments without referring back to the High Court the difficulties which prevent the government from accepting its advice, the consultation would not be effective and any appointment of a person as a District Judge by direct recruitment from the bar or by promotion from the judicial services under Article 233(1) would be invalid. Unless the State Government were to convey to the High Court the difficulties which prevent the government from accepting its advice by referring back the matter the consultation would not be effective.

23. Indubitably, the power of appointment of persons to be District Judges conferred on the Governor, meaning the State Government, under Article 233(1) in consultation with the High Court is an executive function. It has been settled by a long line of decisions of this Court starting from Chandra Mohan v. State of U.P. to M.M.Gupta v. State of J & K that the power of the State Government is not absolute and unfettered but is hedged in with conditions. The exercise of the power of the Governor under Article 233(1) in the matter of appointment of District Judges is conditioned by consultation with the exercise of the power that the power can only be exercised in consultation with the High Court.

24. Appointment of persons to be, and the posting and promotion of, District Judges in any State, shall be made by the Governor of the State under Article 233(1) in consultation with the High Court exercising jurisdiction in relation to such State. Sub-Article (2) thereof provides that a person not already in the service of the Union or of the State shall only be eligible to be appointed as 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. It is therefore obvious that eligibility of appointment of persons to be District Judges by direct recruitment from amongst the members of the bar depends entirely on the recommendation of the High Court. The State Government has no power to appoint any person as a District Judge except from the panel of names forwarded by the High Court. As stated, the decisions starting from Chandra Mohan v. State of U.P. have established the principle as a rule of law, that consultation between the Governor and the High Court in the matter of appointment of District Judges under Article 233(1) must not be empty formality but real, full and effective.

25. In Chandra Mohan v. State of U.P. Subba Rao, C.J. speaking for a unanimous court observed : The exercise of the power of appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of District Judge in consultation with the High Court. The object of consultation is apparent. The High Court is expected to know better than the Governor in regard to the suitability or otherwise of a person, belonging either to the Judicial Service or to the bar, to be appointed as a District Judge. Therefore, a duty is enjoined on the Governor to make the appointment in consultation with a body which is the appropriate authority to give advice to him.These provisions indicate that the duty to consult is so

integrated with the exercise of the power that the power can be exercised only in consultation with the person or persons designated therein.

To the same effect are the decisions in Chandramouleshwar Prasad v. Patna High Court, (1969) 3 SCC 56, High Court of P & H v. State of Haryana, (1975) 1 SCC 843, A.Panduranga Rao v. State of A.P., (1975) 4 SCC 709, and M.M. Gupta v. State of J & K, (1982) 3 SCC 412.

It becomes, therefore, obvious that no recruitment to the post of a District Judge can be made by the Governor without recommendation from the High Court. Similarly, appointments to Subordinate Judiciary at grass-root level also cannot be made by the Governor save and except according to the rules framed by him in consultation with the High Court and the Public Service Commission. Any statutory provision bypassing consultation with the High Court and laying down a statutory fiat as is tried to be done by enactment of Section 4 by the Bihar Legislature has got to be held to be in direct conflict with the complete Code regarding recruitment and appointment to the posts of District Judiciary and Subordinate Judiciary as permitted and envisaged by Articles 233 and 234 of the Constitution. Impugned Section 4, therefore, cannot operate in the clearly earmarked and forbidden field for the State Legislature so far as the topic of recruitment to District Judiciary and Subordinate Judiciary is concerned. That field is carved out and taken out from the operation of the general sweep of Article 309. It is, of course, true as laid down by a catena of decisions of this Court, that topics of constitution of courts and services, laying down of rules regarding the conditions of service other than those expressly placed within the jurisdiction of the High Court by Articles 233 and 235, providing for age of superannuation or other retirement benefits to judicial officers, fixing pay scales, diversification of cadres may form part of general recruitment and conditions of services falling within the spheres of Governors rule making power under Article 309 read with second part of Article 235 or may even be made subject matter of legislation by competent Legislature in exercise of its legislative powers under entry 41 of List II or for that matter entry 11A of List III of the Seventh Schedule. But save and except this permitted field, the State Legislature cannot enter upon the forbidden field expressly reserved for consultation with the High Court by the thrust of Articles 233 and 234 so far as the initial entry point of recruitment to judicial service at grass root level or at the apex level of the District Judiciary is concerned. A three-Judge Bench of this Court in the case of A.Panduranga Rao vs. State of Andhra Pradesh & Ors., AIR 1975 SC 1922, speaking through Untwalia, J., considered the question whether any one can be appointed by the Governor as a District Judge without being recommended by the High Court. Relying on the Constitution Bench decision of this Court in Chandra Mohans case (supra) in para 7 of the Report, observations were made as under :

> There are two sources of recruitment, namely, (i) service of the Union or the State, and (ii) members of the Bar. The said Judges from the first source are appointed in consultation with the High Court and those from the second source are appointed on the recommendation of the High Court.
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> And thereafter following pertinent observations were made in para 8, which read as under : A candidate for direct recruitment from the Bar does not become eligible for appointment without the recommendation of the High Court. He becomes eligible

> only on such recommendation under clause (2) of Article 233. The High Court in the judgment under appeal felt some difficulty in appreciating the meaning of the word recommended. But the literal meaning given in the Concise Oxford Dictionary is quite simple and apposite.

It means suggest as fit for employment. In case of appointment from the Bar it is not open to the Government to choose a candidate for appointment until and unless his name is recommended by the High Court.

It is, therefore, obvious that the State Legislature has no role to play while controlling appointments of District Judges under Article 233 or appointment of Civil Judges to Subordinate Judiciary at grass-root level under the District Judiciary and it is only the Governor who is entrusted with the said task which he has to undertake after consultation with the High Court and by framing appropriate rules for recruitment to Judiciary at grass-root level as enjoined by Article 234 and can only act on recommendation by the High Court for direct recruitment from the Bar for being appointed as District Judges as laid down by Article 233 sub-article (2). There is no third method or third authority which can intervene in the process or can have its say, whether legislative authority or executive authority, as the case may be, independently of the complete scheme of such recruitment as envisaged by the aforesaid two Articles. It is, therefore, difficult to appreciate the contention of learned senior counsel for the appellant-State that paramount legislative power of the State Legislature stands untouched by the scheme of the aforesaid two Articles of the Constitution. Shri Dwivedi, learned senior counsel for the appellant-State was right when he contended that Article 16(4) is an enabling provision permitting the State to lay down a scheme of reservation in State Services. It may also be true that Judicial Service can also be considered to be a part of such Service as laid down by this Court in the case of B.S.Yadav & Ors.etc. (supra). However, so far as the question of exercising that enabling power under Article 16(4) for laying down an appropriate scheme of reservation goes, as seen earlier, we cannot be oblivious of the fact that the High Court, being the high Constitutional functionary, would also be alive to its social obligations and the Constitutional guideline for having scheme of reservation to ameliorate the lot of deprived reserved categories like the SC, ST and Other Backward Classes. But for that purpose, the Governor can, in consultation with the High Court, make appropriate rules and provide for a scheme of reservation for appointments at grass-root level or even at the highest level of the District Judiciary, but so long as this is not done, the State Legislature cannot, by upsetting the entire apple-cart and totally bypassing the Constitutional mandate of Articles 233 and 234 and without being required to consult the High Court, lay down a statutory scheme of reservation as a road roller straight jacket formula uniformly governing all State Services, including Judiciary. It is easy to visualise that the High Court may, on being properly and effectively consulted, endorse the Governors view to enact provision of reservation and lay down the percentage of reservation in Judicial Service, for which it will be the appropriate authority to suggest appropriate measures and required percentage of reservation, keeping in view the thrust of Article 335 which requires the consideration of the claim of members of SC, ST and OBC for reservation in Services to be consistent with the maintenance of efficiency of administration. It is obvious that maintenance of efficiency of judicial administration is entirely within the control and jurisdiction of the High Court as laid down by Article 235. The State Legislature, on its own, would obviously lack the expertise and the knowledge based on experience

of judicial administration which is possessed by the High Court. Consequently, bypassing the High Court, it cannot, in exercise of its supposed paramount legislative power enact any rule of thumb and provide fixed percentage of reservation for SC, ST and Other Backward Classes in Judicial Services and also lay down detailed procedure to be followed as laid down by sub-sections (3) to (6) of Section 4 for effecting such statutorily fixed 50% reservation. It is easy to visualise that if the High Court is not consulted and obviously cannot be consulted while enacting any law by the State Legislature and en bloc 50% reservation is provided in the Judicial Service as is sought to be done by Section 4 of the Act and which would automatically operate and would present the High Court with a fait accompli, it would be deprived of the right to suggest during the Constitutionally guaranteed consultative process, by way of its own expertise that for maintenance of efficiency of administration in Judicial Service controlled by it, 50% reservation may not be required, and/or even lesser percentage may be required or even may not be required at all. Even that opportunity will not be available to the High Court if it is held that the State Legislature can enact the law of reservation and make it automatically applicable to Judicial Service bypassing the High Court completely. Such an exercise vehemently canvassed for our approval by learned senior counsel for the appellant- State cannot be countenanced on the express scheme of the Constitution, as discussed by us earlier. Even proceeding on the basis that the scheme of Article 16(1) read with Article 16(4) may be treated to be forming a part of the basic feature of the Constitution, it has to be appreciated that for fructifying such a Constitutional scheme Article 335 has to be kept in view by the authority concerned before such a scheme of reservation can be promulgated. Once Article 335 has to be given its full play while enacting such a scheme of reservation, the High Court, entrusted with the full control of Subordinate Judiciary as per Article 235 by the Constitution, has got to be consulted and cannot be treated to be a stranger to the said exercise as envisaged by the impugned statutory provision.

We may now refer to one submission of learned senior counsel Shri Dwivedi for the appellant-State. He contended that there cannot be any dispute reOBgarding appointments to available vacancies in the cadre of District Judiciary and that they can be filled in only on the recommendation of the High Court and equally there cannot be any dispute regarding filling up of all vacancies in the Subordinate Judiciary as per Article 234. They can be filled in by the Governor as per rules framed in consultation with the High Court and the Public Service Commission. But so far as reservation of vacancies to be filled in by reserved category of candidates is concerned, it is an exercise which is resorted to by the State authorities in discharge of their enabling powers under Article 16(4). That is a stage anterior to the question of recruitment or appointment on available vacancies in the cadre of District Judiciary or in the cadre of Subordinate Judiciary. Consequently, such an exercise invoked by any administrative order or, even by legislation, cannot be said to be conflicting in any manner with the procedure of recruitment and appointment to District Judiciary and Subordinate Judiciary as per Articles 233 and 234 of the Constitution. This argument, as submitted, looks attractive but on closer scrutiny falls through, as we shall see presently. It is not in dispute and cannot be disputed that creation of cadres and creation of posts in a cadre comprised in Judicial Service of the State can be resorted to by the Governor in exercise of his rule making power under Article 309 or for that matter by any appropriate Legislation by the State authorities under the very same Article. But once cadre of District Judges and Subordinate Judiciary are constituted by the aforesaid authorities and posts backed up by suitable budgetary provisions are created and are accordingly made available to be filled in in the concerned cadres, process of creation of posts comes to an end. Thereafter when in

the created posts borne on any judicial cadre, whether at the District Court level or at the Subordinate Court level, any vacancies arise by retirement or otherwise non-availability of the incumbents due to any other reason, question of filling up of those available vacancies would arise. Such available vacancies of sanctioned posts have to be filled in only after following the procedure laid down by Articles 233 and 234 of the Constitution of India and cannot be subjected to any other procedure. At that stage, directing the High Court without its consent and consultation and merely by the thrust of legislative provision that 50% of the available vacancies in the cadre of District Judges or Judges of the Subordinate Judiciary must be filled in from reserved candidates only would ex-facie cut across the power of the High Court which alone can recommend the filling up of all such vacancies in the district cadre as per Article 233 and equally the power of the High Court to render effective consultation to the Governor under Article 234 when he frames rules for recruitment of candidates for filling up of all available vacancies in the Subordinate Judiciary under the district court as per Article 234. It is difficult to appreciate how filling up of vacancies in the already sanctioned posts in these cadres will remain an exercise anterior to the procedure laid down by the Constitution for filling up of these vacancies as per Articles 233 and 234, as the case may be. In any case, impugned Section 4 of the Act, by its express wordings, does not contemplate any such stage anterior to filling up of vacancies in the existing posts. On the contrary, it provides that all appointments to Services and Posts in an establishment which are to be filled in by direct recruitment shall be regulated in the manner laid down therein. Meaning thereby, 50% of the appointments to such available posts have to be done from reserved category candidates as per percentage provided for each of such classes. That necessarily means that 50% of the existing vacancies in the available posts in the Services have to be filled in from reserved category candidates only. This mandate of Section 4, therefore, gets directly hit by the scheme of the complete Code for such direct recruitment to the Judicial Services in the district cadre or subordinate cadre, as envisaged by Articles 233 and 234 of the Constitution of India.

We may take an example to highlight this position. Supposing there are 10 vacancies of District Judges at a given point of time in the State, which are available to be filled in by direct recruitment keeping in view the ratio of such direct recruitment permissible under the relevant rules. Once these 10 vacancies of District Judges are required to be filled in by direct recruitment on the recommendation of the High Court from the members of the Bar subject to the minimum eligibility laid down under Article 233 sub-article (2), the High Court obviously has to undertake the exercise of selection of eligible candidates on its own. The Governor, in such a case, shall have only to pass consequential orders of appointment from the panel as recommended by the High Court. If no such recommendations are forthcoming, the Governor will have no jurisdiction or power to make any such appointment as clearly mandated by Article 233 sub-article (2). Once the High Court undertakes such an exercise and prepares a panel of eligible and suitable direct recruits from the Bar after holding appropriate tests whether written or oral as the relevant procedural rules may provide, it will, in the serial order of inter se merit prepare a panel of 10 candidates and recommend them for appointment and the panel may be sent for passing appropriate orders. If that is so, all the 10 vacancies have to be filled in in the light of the panel prepared by the High Court, keeping in view the names of candidates listed in the panel as per the rankings made by the High Court in the order of their respective merits. Therefore, the High Court will prepare a panel of 10 recommendees for appointment to first 10 vacancies in the serial order of their ranking as per merit and suitability.

This is the Constitutional mandate of that Article. Now if it is visualised that the State Legislature, by an independent enactment, as in the present case, requires the High Court to treat only the first five vacancies to be filled in by direct recruitment from general category in the order of merit and the remaining five vacancies are required to be filled in from reserved category of candidates only and even if those reserved five vacancies can be filled in by appointing reserved category of candidates as per the order of their inter se merit, even then the thrust of Section 4, to that extent, will certainly cut across or restrict the power and authority of the High Court to recommend appointments to all the ten vacancies of suitable meritorious candidates as found by it. The result would be that first five vacancies may go to the first five candidates recommended in the panel according to merit but so far as the vacancy nos.6 to 10 are concerned even though the 6th direct recruit recommended by the High Court is obviously more meritorious than the candidate listed in the panel at serial no.7, he may have to be bypassed if the candidate at serial no.6 in the panel belongs to general category while candidate no.7 belongs to SC category namely, reserved category. The net result would be that though the High Court, in exercise of its Constitutional obligation and authority, recommends the 6th vacancy in the District Judge cadre to be filled up by candidate no.6 listed in the panel, by thrust of impugned Section 4 of the Act, the 6th vacancy can be filled in by the Governor by appointing candidate no.7 who is less meritorious as compared to candidate no.6 and who is not recommended by the High Court for being appointed in vacancy no.6. Thus, he will be bypassed by candidate no.7 who may belong to the SC category and who may be standing higher in so far as inter se merit between the SC candidates only are concerned. Supposing at serial no.9 there is another SC candidate then vis-.-vis candidate nos.7 and 9, who both belong to SC category, this 6th vacancy, because of the thrust of Section 4 can be filled up by candidate no.7. The submission of Shri Dwivedi that between two SC candidates or candidates belonging to the same reserved category it will be open to the High Court to recommend appointment of more meritorious reserved category candidate as compared to the candidate of the same category who is less meritorious and this exercise would satisfy the requirement of Article 233 sub-article (2) only gives lip service to that Article. The reason is obvious. The High Courts power and in fact Constitutional obligation to recommend meritorious candidates found suitable by it for filling up of all vacant posts will obviously get truncated and restricted and the High Court though not recommending candidate No.7 as suitable candidate for filling up vacancy no.6, will be helpless by not being permitted appointment of candidate no.6 who belongs to general category to occupy that post and will have willy-nilly to suffer against its own decision regarding appointment of candidate no.7 who belongs to SC category for filling up vacancy no.6 and this exercise will be thrust upon the High Court without being consulted in this connection by the State Legislature by enacting the impugned Section 4 of the Act. This appointment obviously will be null and void and violative of Article 233 (2). This type of bypassing the High Court will clearly be an act of interference with independence of judiciary which is the hallmark and bedrock of the Constitutional scheme. Section 4, therefore, has got to be held not to be operative on the forbidden field occupied by Articles 233 and 234 of the Constitution of India. This is obviously a type of reservation which is thrust upon the High Court by Section 4. It cannot be treated to be referable to a stage anterior to the process of recruitment and appointment. In fact, as seen above, Section 4 itself deals with the reservation for direct recruitment on available posts. Therefore, in the field of recruitment itself Section 4 seeks to have its independent sway. Both Article 233 and Article 234 also deal with the very same question of recruitment and appointment to District Judiciary. It is this very field wholly reserved for operation of Articles 233 and 234 that is

encroached upon by Section 4, by its express language, if made applicable to judicial appointments. As seen earlier, consultation with the High Court is a sine qua non in connection with direct recruitment of judicial officers at grass-root level i.e. Munsiffs and Magistrates and whose recruitment is governed by the rules framed under Article 234 being the 1955 Rules. Similarly, recruitment at district level judiciary is governed by 1951 Rules framed under Article 233 read with Article 309 of the Constitution of India. However, direct recruitment as District Judges has to be solely based on appropriate recommendations of suitable candidates by the High Court. In fact Rule 3 thereof, provides that the strength of the Service and the number and character of the posts shall be as specified in the schedule to these rules, and once we turn to the Schedule to the 1951 Rules, we find listed five cadres of superior judiciary at the district level and the total posts sanctioned being 26. Obviously, this rule has a direct nexus with Article 309 read with Article 233. But beyond that when the question of filling up of vacancies in the cadres of higher District Judiciary on the already sanctioned posts crops up, the field is fully occupied by Article 233 sub-articles (1) and (2) and there is no other power with any other Constitutional authority to effect such recruitment on available vacancies. It is not possible to visualise that, while providing for direct recruitment to District Judiciary as per Article 233 sub-article (2), even though the minimum eligibility qualification laid down under the said provision is that the candidate should have been practising for not less than seven years as an advocate or a pleader, any further eligibility as belonging to a reserved category is envisaged for a given post. Consequently, it is not possible to agree with the contention of learned counsel Shri Dwivedi for the appellant-State that question of recruitment to the cadre of District Judges by directing the High Court to recommend eligible candidates for appointment keeping in view only 50% of the available vacancies to be filled in by general category and by treating the remaining 50% of the vacancies as reserved would be a stage anterior to the stage of recruitment or appointment to such available vacancies on the already sanctioned posts in the cadre of District Judiciary. At this stage we may also refer to the decision of a Constitution Bench of this Court in B.S.Yadavs case (supra) wherein Chandrachud, CJ had an occasion to interpret Article 235 read with Article 309 proviso. The question which arose for consideration in that case was whether the rule of seniority of existing members of Superior Judicial Services as framed by the Governor in exercise of his powers under Article 309 proviso could validly operate to regulate the seniority of such already recruited and appointed judicial officers in Subordinate Judiciary. In order to avoid the operation of the said rule which was having a direct nexus with conditions of service of already appointed judicial officers, a contention was raised that under Article 235 even this subject matter was part and parcel of the control of Subordinate Judiciary vesting in the High Court under that article. While negativing this contention, the Constitution Bench, speaking through Chandrachud, CJ, placed reliance on the second part of Article 235 and observed as under : The power of control vested in the High Court by Art.235 is expressly made subject to the law which the State Legislature may pass for regulating the recruitment and service conditions of judicial officers of the State. The framers of the Constitution did not regard the power of the State Legislature to pass laws regulating the recruitment and conditions of service of judicial officers as an infringement of the independence of the judiciary. The mere powers to pass such a law is not violative of the control vested in the High Court over the State judiciary.

Placing strong reliance on the aforesaid observations it was contended by learned senior counsel for the appellant-State that it has been authoritatively ruled by the Constitution Bench of this Court that

the framers of the Constitution did not regard the power of the State Legislature to pass laws regulating the recruitment and conditions of service of judicial officers as an infringement of the independence of the judiciary. Now it must be kept in view that these observations are made in the light of second part of Article 235 which expressly saves laws regulating the conditions of service of already recruited judicial officers and who are functioning under the control of the High Court under Article 235. Once the very same Article permits the limited field for operation of law-makers or rule-makers under Article 309 for regulating the conditions of services of such already appointed judicial officers by way of enacting any appropriate statutory provision either by exercise of rule making power of the Governor under Article 309 proviso or by appropriate legislation under the said Article, it cannot be said that these observations have laid down even impliedly, that while recruiting judicial officers either at grass-root level under Article 234 or at district level under Article 233 any legislation can be enacted by the Legislature or that the Governor by independent exercise of his rule making power can make such a provision. This question of controlling recruitment and appointment at the entry point either at grass-root level i.e. level no.1 or at the apex level being level no.3 in the pyramid of District Judiciary never arose for consideration of the Constitution bench and hence the aforesaid observations cannot be considered to be the decision rendered by the Court on this moot point. It is also easy to visualise that while considering the scope of play of Article 309 vis-.-vis second part of Article 235 which carves out a permissible field by the very same Article for law to be made for regulating other permissible conditions of service the term recruitment has been employed almost by way of mere reference to the language of Article 309 and nothing more. If it is held that even impliedly the aforesaid decision of the Constitution Bench has taken the view that the appropriate authority, i.e. the Governor, in exercise of his delegated legislative powers under the Proviso to Article 309 or any State Legislature in exercise of its paramount power under Article 309 first part, can control the recruitment of judicial officers at district level or at the level of Subordinate Judiciary bypassing the High Court, then such an implied thrust of the said observations must be held to be totally obiter and uncalled for. Consequently, the aforesaid decision in B.S.Yadavs case (supra) must be confined to the facts of that case laying down the limited ratio that for deciding the rule of seniority of already appointed judicial officers in District Judiciary or Subordinate Judiciary, appropriate law or rules can be framed under Article 309 by the concerned authority as permissible under second part of Article 235. That is the only ratio of that decision and it cannot travel any further. However, leaving aside that question, it can easily be visualised that the aforesaid observations in the Constitution Bench judgment in B.S.Yadavs case (supra) may, in general sense, refer to the concept of recruitment as laid down by proviso under Article 309 in view of the settled legal position that, in exercise of their powers under the said Article, the concerned authorities can form cadres of service in Subordinate Judiciary and can also create sanctioned posts in these cadres. The said exercise of creation of posts may also get covered by the concept of recruitment. It is only in this broad sense that the term recruitment can be said to have been mentioned by the Constitution Bench in the aforesaid observations but they can certainly not go any further nor can be treated to have ruled anything contrary to the express scheme of Articles 233 and 234. This is the additional reason why the aforesaid general observations have to be confined to the limited scope and ambit of Article 309, as indicated therein. For all these reasons, therefore, the decision in B.S.Yadavs case (supra) cannot be of any real assistance to learned counsel for the appellant-State. We may now briefly deal with the main contentions canvassed by learned senior counsel for the appellant-State in support of their appeals. We shall

first deal with the contentions canvassed by Dr.Dhavan for the appellant-State. The interpretation sought to be put on Article 309 by Dr.Dhavan, as we have already seen earlier, is not capable of having wider coverage so as to engulf recruitment to judicial offices on district cadre as well as on those below the district cadre. The Constitutional scheme examined and seen earlier contra-indicates this contention. So far as Dr.Dhavans submission that second part of Article 235, despite the full control of District Judiciary being vested in the High Court permits enactment of suitable provisions under Article 309 also, cannot be of any real assistance. As we have already seen above, the second part of Article 235 deals with the topic of other conditions of service including the right of appeal which might be guaranteed to judicial officers by appropriate legislation enacted by the authorities acting under Article 309 but that is an operation on the limited field permitted by the second part of Article 235 at second level of the pyramid of Subordinate Judiciary and nothing more. Dr.Dhavan was right when he contended that on the scheme of Articles 233 to 235 it is not as if other legislation is a total taboo. However, the said submission ignores the fact that it is the limited field earmarked by second part of Article 235 regarding permissible regulation of conditions of service that is reserved for operation of Article 309 through its appropriate authorities. But, save and except this limited aspect which is permitted, the rest of the control totally vests in the High Court under Article 235 first part. What is permitted by Article 235 cannot be considered as a blanket power entrusted to the Legislature or to the Governor under Article 309 by the Constitutional makers dehors the complete net of Constitutional scheme controlling recruitment and appointment to District Judiciary and the Subordinate Judiciary under Articles 233 and 234 of the Constitution of India. These twin Articles conspicuously do not envisage even the limited independent field for operation of Article 309 as is permitted by Article 235 second part. That shows the clear intention of the Constitutional makers that so far as question of recruitment and appointment to available vacancies in the cadre of District Judges and Judges of the Subordinate Judiciary is concerned, neither the Legislature nor the Governor, dehors any consultation with the High Court, can have any independent say. We may now deal with the supposed anomalies that may result if the interpretation canvassed by the respondent High Court is accepted. Dr.Dhavan contended that, if power of the State Legislature to enact appropriate provisions for appointment of members of Subordinate Judiciary is excluded by Article 234, and to that extent Article 309 is also to be out of picture, then various anomalous situations may arise. He firstly, submitted that judicial service as defined by Article 236(b) will get truncated in its operation. It is not possible to agree with this contention for the simple reason that the definition of judicial service only earmarks the Members of that Service. How their appointment is to be made has to be gathered from Articles 233 and 234. If they exclude any statutory interference by the State Legislature such interference would remain excluded by the sweep of these two Articles themselves. The second anomaly pointed out by Dr.Dhavan is that power to legislate must be given full effect unless there is express exclusion. Even this cannot be said to be an anomaly for the simple reason that Article 309 itself is subject to the opening part of the clause and has to give way if other Articles of the Constitution cover the field. The complete Code projected by Articles 233 and 234 would itself be an exclusion of the legislative power and equally the Governors independent power under Article 309 qua that field. Even that apart, Article 245 dealing with the legislative powers of Parliament and the State Legislatures in terms makes the said provisions subject to other provisions of the Constitution. Therefore, on the same analogy by which Article 309 cannot independently operate qua the exclusive field carved out by Articles 233 and 234, the legislative powers of Parliament as well as the State Legislature would

also get excluded. The next anomaly pointed out by Dr.Dhavan was that under the Constitution, the scheme of separation of powers is devised to separate the Executive from the Judiciary and that this scheme does not extend to oust the legislative power. If it is held that Article 234 ousts the legislative power for making suitable enactment on the topic covered by it, then to that extent, it is contended, an anomalous situation would arise not contemplated by the Constitutional scheme. It is difficult to appreciate this contention. As per Article 50 of the Constitution of India, judicial functioning has to be treated to be separate from that of the executive and to fructify the said Constitutional scheme, Article 309 is made subject to other relevant Articles of the Constitution including Articles 233 and 234. Thus Articles 233 and 234 have their full sway not being inhibited by any outside independent interference to be made by the Governor under proviso to Article 309 or by the State Legislature in that connection. Dr.Dhavan next contended that on the express language of Article 233, only the rule making power of the Governor is fettered but not the legislative power of the State. This submission is mis-conceived as the legislative power is co-terminus with the Governors rule making power. For regulating the conditions of Service of Members of public service as found in Article 309, as the proviso to Article 309 itself shows, what the legislature can enact in connection with the topic mentioned therein can be done by the Governor in exercise of his rule making power as a stop-gap arrangement till the very same field is covered by the statutory enactment. Thus the earmarked field is the same, namely, conditions of Service of employees of State Public Service. Employees of a Public Service are a genus of which Members of Judicial Service are a species. So far as the appointment to Judicial Service is concerned, the said topic is carved out from the general sweep of Article 309 on account of the words in its opening part, read with Articles 233 and 234. The Governors rule making power in this connection is separately dealt with under Article 234 and it is the procedure laid down therein which will govern the said rule making power of the Governor and cannot draw any sustenance independently from Article 309 which gets excluded in its own terms so far as Members of Judicial Service are concerned. A limited play available to the Legislature to deal with unexcepted and open categories of conditions of Service of judicial officers as found in Second Part of Article 235, therefore, cannot be read backwards to govern even by implication the method of appointment of Members of Subordinate Judiciary even at the grass-root level. For that purpose, Article 234 is the only repository of the power available to the concerned Constitutional authority which has to follow the gamut of the procedure laid down therein. Dr.Dhavan tried to salvage the situation by submitting that if this view is taken, the greatest anomaly that would arise is that there would be total ouster of legislative interference as per Article 234. There will be definite permissible interference of legislative power on topics mentioned in second part of Article 235. While so far as appointments of District Judges under Article 233 are concerned, there is no express ouster of legislative interference at all. He, therefore, submitted that a totally anomalous situation would emerge, as at the grass-root level i.e. lowest rung of regulating the recruitment and appointment of Judiciary, there will be total exclusion of legislative interference while at the apex level i.e. at the district level there will be no ouster of legislative interference. Even this argument of despair cannot be countenanced for the simple reason that on the topic of appointment of direct recruits to the District Judiciary at the district court level or even at the grass-root level of Munsiffs and Civil Judges-junior division or senior division, as the case may be, both under Article 234 as well as under Article 233 interference by the State Legislature is totally excluded. If appointments at the grass-root level in Subordinate Judiciary is taken as base level no.1 in the pyramid of Subordinate Judiciary, as indicated earlier, then the express language of Article

234 lays down a complete procedure which cannot be tinkered with by any outside agency like the legislature. For regulating the service conditions of already appointed judicial officers which will be treated as level no.2, to the extent to which the conditions of service can be regulated by law as laid down by second part of Articles 235 a limited field is kept open for legislative play. It is only because of the permissible field indicated by the very same Article that the Governor under Article 309 or even the State Legislature can be permitted to operate in that field. While at the apex level of the pyramid of Subordinate Judiciary, which is level no.3, for recruiting District Judges a complete Code is furnished by Article 233 excluding outside interference, as indicated earlier. Thus neither at the base level i.e. at the grass-root level of controlling entry point to Subordinate Judiciary nor at the entry point at the apex level of the pyramid for appointing District Judges any State Legislatures interference is contemplated or countenanced. On the contrary, it is contra-indicated by necessary implication. Thus, neither at the first level nor at the third level, both dealing with entry points to Subordinate Judiciary, the State Legislature has any say and at the second level it has a limited say to the extent permitted by the very same Article 235 second part and which does not pertain to recruitment or appointments at all. Thus, it cannot mean that because of this limited independent play at the joint is available to the authorities functioning under Article 309 at the second level to frame rules or legislation for permissively regulating the conditions of service of the members of the judiciary who have already entered the Judicial Service at the grass-root level, or even at the district level, any anomalous situation emerges. Dr.Dhavan then invited our attention to the observations of a nine-Judge Constitution Bench judgment of this Court in Indra Sawhney & Ors. case (supra), para 694 at page 662, para 738 at page 689 and para 788 at page 720, for submitting that Article 16 sub-article (4) enables the State authorities to direct reservation in Services under the State. This Constitutional power, once exercised, cannot be sought to be circOBumscribed or curtailed by non-compliance with the procedure of Article 234 or for that matter Article 233. This argument of his cannot be countenanced. It is obvious that for utilising the enabling power under Article 16(4), the State Legislature cannot enter the forbidden field and conflict with substantive provisions of Article 233 or first part of Article 235. Meaning thereby, neither can it lay down new criterion of eligibility contrary to sub-article (2) of Article 233 for appointment to the District Judiciary nor can it affect the control of the High Court in connection with District Judiciary as vested in the High Court under first part of Article 235. If at all any reservation policy under Article 16(4) is to be pursued, it has to be exercised in consonance with the scheme of Articles 233 and 234 and not dehors it. Dr.Dhavan fairly conceded that neither in the Rules of 1951 regarding appointments to district cadre as per Article 233 nor under the Rules of 1955 for appointments in the cadre of Subordinate Judiciary as laid down by Article 234, there is any provision for 50% reservation of posts. As already noted earlier, Article 16(4) is an enabling provision and it enables the competent authority which is entrusted with the task of recruitment and appointment to any service including the Judicial Service to exercise this enabling power and provide for appropriate reservation. In fact there is no dispute between the parties in these proceedings that with the consent of the High Court of Patna, 14% reservation for SC and 10% reservation for STs is already accepted as permissible reservation for direct recruitment at the grass-root level and Rule 20 of the Rules of 1955 clearly points to such reservation, percentage of which has already been agreed to between the High Court on the one hand and the Government on the other. That would be perfectly a permissible exercise under Article 16(4) read with Article

234. But beyond that unless the rules are properly amended by following the procedure of Articles 233 and 234 read with Article 309 after consulting the High Court, the Governor on his own cannot provide for any more reservation. Nor can, by a legislative Act, an independent provision under Article 16(4) totally bypassing the High Court be resorted to. As already seen earlier, Article 16(4) has to be read with Article 335 and maintenance of efficiency of administration in the making of appointments to Services and posts would be a sine qua non before considering the claim for reservation of SC and STs which would also include the OBCs as laid down by a Constitution Bench judgment of this Court in Indra Sawhneys case (supra), (2000) 1 SCC 168 = JT 1999 (9) SC

557. If Article 16(4) has to be read with Article 335 as already ruled by the Constitution Bench judgment of this Court, the same authority which can have the pulse and full control of administration pertaining to concerned services having sufficient expertise can avail of the aforesaid Article 16(4) keeping in view the mandate of Article 335. In case of Subordinate Judicial Services comprising of district courts and courts subordinate thereto, the full control vests in the High Court under Article 235 which can control the promotions and postings of such members of the Judiciary. It is the High Court which will have full knowledge and expertise for deciding the question of adequacy of representation by way of reservation in Judicial Service. Therefore, it is the High Court only which can give green signal regarding the extent of such reservations at entry points as candidates entering on reserved posts in Judicial Service of the District Judiciary both at the apex level and at the grass-root level have to act under its control. In the absence of such a green signal by the High Court there would be no occasion to invoke Article 16(4) read with Article 335. We fail to appreciate how the State Legislature by enacting Section 4 of the Act, can decide for itself that 50% reservation is required to be made in appointments to District and Subordinate Judiciary consistent with the maintenance of efficiency of judicial administration which is under full control of the High Court as per Article 235. As it cannot of its own be alive to this vital aspect lacking requisite knowledge and expertise, any scheme of reservation framed by the legislature under Article 16(4) dehors Article 335 so far as judicial appointments are concerned, must necessarily fall through. The authority giving green signal as per Article 16(4) read with Article 335 can be only the High Court. It will be totally out of picture so far as enactment of such straight jacket reservation provisions dehors the High Courts consultation goes. In this view of the matter, the broad submission of Dr.Dhavan that reservation in fulfillment of right to equality of opportunity under Article 16(1) read with Article 16(4) can be resorted to without reference to the High Court and therefore, the impugned Act cannot be found fault with, cannot be accepted. Reliance placed by Dr.Dhavan to the decision of this Court in Durgacharan Misra vs. State of Orissa & Ors., (1987) 4 SCC 646, wherein at para 15 a two Judge Bench observed that Rules under Article 234 are framed by the Governor, in exercise of his rule making power under Article 309, cannot be of any assistance to him. Even if the rules contemplated by Article 234 are framed by the Governor under Article 309 proviso, that power is clearly fettered and regulated by Article 234 as well as Article 233 wherein consultation of the High Court in one case and total clearance by the High Court by way of recommendation of the appointees in the other case, cannot be given a go by. Turning to the contentions canvassed by Shri Dwivedi in support of the companion appeal, it may be stated that he adopted the arguments of Dr.Dhavan but he further contended that under Article 234, the rule making power of the Governor is hedged in by consultation with the High Court and the Public Service Commission. So far as the Public Service Commission is concerned, as per Article 320 sub-article (4), it is not required to be consulted in

respect of the manner in which any provision referred to in clause (4) of Article 16 may be made or as respects the manner in which effect may be given to the provisions of Article 335. Shri Dwivedi, therefore, submitted that consultation with the Public Service Commission cannot be in connection with Article 16(4) and if that is so, by necessary implication, consultation with the High Court under Article 234 can also be treated to be standing at par and consequently the decision on any policy of reservation as per Article 16(4) need not get covered by any consultation with the High Court. It is difficult to appreciate this contention. The Public Service Commission is merely an examining body which examines the candidates for seeking appointments to the advertised posts. It has, therefore, nothing to do with the policy decision of laying down of reservation in appointments to the posts. That policy has to be resorted to under Article 16(4) by the authority calling upon the Public Service Commission to proceed with the procedure of selection of suitable candidates for filling up advertised posts subject to the conditions laid down in the advertisement. That type of consultation naturally would not stand at par with the consultation with the High Court as laid down by Article 234 of the Constitution. As seen earlier, consultation with the High Court as envisaged by Article 234 is for fructifying the Constitutional mandate of preserving the independence of Judiciary, which is its basic structure. The Public Service Commission has no such Constitutional imperative to be fulfilled. The scope of examining bodys consultation can never be equated with that of consultation with the appointing body whose agent is the former. It is also pertinent to note that the essence of consultation is the communication of a genuine invitation to give advice and a genuine consideration of that advice which in turn depends on sufficient information and time being given to the party concerned to enable it to tender useful advice. It is difficult to appreciate how the Governor while consulting the Public Service Commission before promulgating the Rules of Recruitment under Article 234 has to solicit similar type of advice as he would solicit from the High Court on due consultation. The advice which in the process of consultation can be tendered by the Public Service Commission will confine itself to the Constitutional requirements of Article 320. They are entirely different from the nature of consultation and advice to be solicited from the High Court which is having full control over Subordinate Judiciary under Article 235 of the Constitution and is directly concerned with the drafting of efficient judicial appointments so that appropriate material will be available to it through the process of selection both at the grass-root level and at the apex level of the District Judiciary. Consultation, keeping in view the role of the High Court under Article 234 read with Article 235, stands on an entirely different footing as compared to the consultation with the Public Service Commission which has to discharge its functions of entirely different type as envisaged by Article 320 of the Constitution. Naturally, therefore, consultation with the High Court will have a direct linkage with the policy decision as to how many posts should be advertised, what are the felt needs of District Judiciary and whether there can be any reservation which can be permitted to be engrafted in the Rules framed by the Governor consistent with the maintenance of efficiency of judicial administration in the State. It is also pertinent to note that there is no express fetter regarding consultation with the High Court excluding Article 16(4) as we find in Article 320 (4) in connection with the Public Service Commissions consultation. This very departure and absence of such exclusion of the High Courts consultation indicate the intention of the Constitutional makers that policy decision as per Article 16(4) has to be taken by the Governor in consultation with the High Court while framing appropriate rules governing the recruitment and appointments to the Judicial Service both at the apex level and at the grass-root level. Submission of Shri Dwivedi that legislative power stands independently and dehors Articles 235 and 234 cannot be

countenanced for the detailed reasons given by us while rejecting the contentions of Dr.Dhavan. Shri Dwivedis effort to draw sustenance for his argument from the observations of the learned Judges of the Constitution Bench in Indra Sawhneys case (supra) namely, Justice Pandians observations at para 243, Justice Sawant at para 555 and Justice Kuldip Singh in para 383, also cannot be of any avail to him. The question of reservation of posts in a cadre cannot be equated with the question of creation of posts in a cadre. After the posts in a cadre are created how many thereof can be filled in from general category and how many from reserved category candidates, will remain a policy decision which has to be undertaken under Article 16(4) read with Article 335 and only by the competent authority namely, the High Court in dialogue with the Governor so far as Judicial Service is concerned, as we have seen earlier. The observations of learned Judges in the aforesaid Indra Sawhneys case (supra) therefore, regarding the scope and ambit of Article 16(4) in general in connection with those services wherein such reservation would be effected by the competent authorities themselves without consultation with other agencies like the High Court, cannot be of any avail to Shri Dwivedi for culling out the competence of the authority concerned to impose such reservation in connection with Judicial Services without consulting the High Court. Reliance placed by learned counsel for the appellant-State on various rules framed by Governors of other States in consultation with High Courts like the Uttar Pradesh Governor also cannot be of any avail as those rules are framed by the Governors in consultation with the High Courts after following the procedure of Articles 234 or for that matter Article 233. Decisions of this Court relied on by Shri Dwivedi for showing that the Governor can create cadres and also can lay down provisions for regulating the conditions of Service as provided under Article 235 second part also are besides the point. The effort made by learned counsel for the appellant-State to show that Judicial Service also represents a part of State Service and it is the State within the meaning of Article 12 amenable to writ jurisdiction under Article 226 so far as the administrative decisions taken by the courts are concerned also cannot solve the problem which is posed for our consideration. The High Court may be an authority within the meaning of Article 12, its administrative decisions may be subject to its writ jurisdiction on judicial side but that does not mean that for recruiting judicial officers for manning Judicial Services, the say of the High Court can be totally bypassed by enacting provisions like the impugned Act by the State Legislature which, while enacting this statute, was not expected to consult any one else including the High Court. Of course, Shri Dwivedi was right when he contended that in Civil Appeal No.9072 of 1996 there was no occasion for the High Court to treat the policy reflected by the stand of the High Court regarding giving preference in appointments to SC and ST candidates if they are of equal merit with general category candidates as the only reasonable one. It is true that this exercise was not required to be undertaken by the High Court which was concerned with the short question as to whether the impugned Act, especially Section 4 thereof, can be permitted to operate of its own so far as the recruitment to District Judiciary was concerned. To that extent, the aforesaid reasoning of the High Court in the impugned judgment cannot be sustained as being redundant and uncalled for. We may now briefly refer to the written submissions on behalf of the appellant-State submitted by Shri Dwivedi on 20th January, 2000. As we have already discussed earlier, it is not possible for us to agree with the contention that reservation of posts does not truncate the High Courts power of making appointments on available vacancies. In cases where reservations are made after consultation with the High Court, the situation stands entirely on a different footing as the High Court itself agrees with the rule making authority under Article 234 or for that matter under Article 233 to recommend reserved category candidates on

earmarked vacancies in the already created posts in a cadre. But the question is as to whether bypassing the High Court such an exercise can be undertaken by the State Legislature or by the Governor under Article 309. As seen earlier, such an exercise is not countenanced by the relevant Constitutional scheme. It is also not possible to agree with the contention that in the absence of express exclusion of any law made by the Legislature, the legislative power remains untouched by Articles 233 and 234. On the contrary, as seen earlier, because of the opening words of Article 309 as well as Article 245 what is provided by Articles 233 and 234 is a complete Code, which cannot be touched independently of the High Courts consultation either by the Legislature or by the rule making authority. Reliance placed on the observations in paras 16 & 17 in the case of M.M.Gupta & Ors. etc. vs. State of Jammu & Kashmir & Ors., (supra) to the effect that appointing authority is the Governor also cannot advance the case of Shri Dwivedi for the simple reason that under the scheme of Articles 234 and 233 once effective consultation is made with the High Court and rules are framed as per Article 234 and selections are made as per these rules or when the High Court recommends appointments under Article 233, the selection process is over, only the ministerial work of issuing actual appointment orders may be carried out by the Governor. But that would not, in any case, interfere with the independence of Judiciary and the power of the High Court. The Governor, acting as per Article 234 while framing rules in consultation with the High Court and the Public Service Commission and also while acting on the recommendation of the High Court under Article 233, only performs the ultimate act of issuing actual appointment orders to the selectees but these selectees have undergone the process of filtering by the High Court as per Article 233(2) or in cases governed by Article 234, as per the procedure laid down in the rules framed under that Article, after consultation with the High Court. It is not as if the Council of Ministers or the Legislature has anything independently to say to the Governor in this connection bypassing the High Court. Reference to the case in Samsher Singh etc. vs. State of Punjab & Anr. etc., AIR 1974 SC 2192, about Cabinets responsibility to Legislature is totally besides the point while considering the moot question with which we are concerned. It is difficult to appreciate on the scheme of Articles 233 to 235 the contention of Shri Dwivedi that recruitment procedure could be laid down either by the Legislative enactment or rules under Article 309 without having consultation with the High Court. Further contention of Shri Dwivedi that Parliamentary system of governance is also a basic feature of the Constitution also cannot advance his case for the simple reason that Article 235 itself read with Article 309 furnishes restraints on the legislative power so far as topics of recruitment and appointment to District Judiciary and Subordinate Judiciary are concerned being covered by the complete code of Articles 233 and 235, as seen earlier. The dichotomy sought to be suggested between the process of selection for recruitment to advertised posts on the one hand and reservation of posts in a cadre on the other by Shri Dwivedi is not a real one. As already seen earlier, recruitment and appointments have to be done to already created posts in the cadre and once the procedure of creation of posts is over, the further question as to how these posts are to be filled in and from which source or category of candidates, will entirely depend upon the rules framed by the Governor in consultation with the High Court, so far as Article 234 is concerned and will wholly be subject to the recommendations of the High Court under Article 233. The submission of Shri Dwivedi that cadre formation is in the exclusive domain of the government and forms part of constitution of State Judicial Service, cannot have any impact on the moot question as to how created posts in a given cadre can be filled in and from which category of candidates. That remains essentially in the domain of recruitment and appointment to already existing, created and sanctioned posts in a given cadre.

Reliance placed on Articles 37, 38 and 46 read with Article 16(4) cannot have any impact on the decision of the question posed for our consideration. Reliance placed by Shri Dwivedi on the decisions of this Court in Indra Sawhneys case (supra), Dr.Preeti Srivastava & Anr. etc. vs. State of M.P. & Ors.etc., (1999) 7 SCC 120 and in Durgacharan Misra vs. State of Orissa & Ors. (supra) also cannot be of any effective help for resolving the question with which we are concerned. The general scheme of reservation and to what extent it can be applied to a given service directly under the control of the State without any reference to Judicial Service, as discussed in the first two cases, can be of no avail to Shri Dwivedi. So far as the case of Smt.A.Lakshmikutty (supra) is concerned, the relevant observations in the concerned paragraphs do not support the submissions put forward by Shri Dwivedi for the appellant-State. Even if Judicial Service is also a State Public Service and hence a Service under the State as laid down therein so as to attract Articles 12 and 226 of the Constitution, the question which remains for consideration is as to whether the scheme of recruitment and appointment to the Subordinate Judiciary as laid down by the Constitution itself can be encroached upon, whittled down or cut across by any enactment or rule dehors the said Constitutional scheme. Smt.A.Lakshmikuttys judgment (supra) had not to consider that question. Even though judicial officer in the Judicial Service of the State would be an officer under the State and according to which principle, to a limited extent, the conditions of service of said judicial officer can be laid down by the State or the Governor under Article 309 independently of the High Court as per the second part of Article 235, so far as Articles 233 and 234 are concerned as already seen earlier, they stand entirely on a different footing and do not countenance any independent encroachment on the field covered by the said provisions bypassing the High Court. There cannot be any dispute that laying down of pay-scales as one of the conditions of Service under the second part of Article 235 is not within the expression of control which is vested in the High Court as laid down in Smt.Lakshmikuttys case (supra). But it is difficult to appreciate how reservation can be treated on par with laying down of pay scales. Making available pay-scales to the members of the Judicial Service will have a direct impact on the State exchequer and Consolidated Fund of State in case of District Judiciary but that does not mean that the recruitment to such judicial posts also can be controlled by the State, dehors the requirements of Articles 233 and 234. The next written submission of Shri Dwivedi placing reliance on a judgment of this Court in the Belsund Sugar Co. Ltd. vs. The State of Bihar & Ors.etc., JT 1999 (5) SC 422, that reservations are a special topic and, therefore, the general expression of appointments would not embrace, the same cannot be accepted for the simple reason that once posts are created and sanctioned in a cadre, to the extent to which any independent order or direction under Article 309 or Article 16(4) encroaches upon the field of recruitment and appointment to such posts, specially carved out by the Constitutional makers for operation by the Governor in consultation with the High Court or with the concurrence or recommendation of the High Court, as the case may be, the said encroachment would remain totally ultra vires and cannot be saved by provisions of reservation envisaged by Article 16(4). Reliance placed by Shri Dwivedi on a decision of this Court in Chandra Mohans case (supra) to show that there is no complete separation of powers has to be appreciated in the light of the observations made therein in connection with the nature of permissible field for operation of state authorities under Article 235(2). These observations have nothing to do with the complete separation of powers between the Judiciary and the Executive so far as initial recruitment at entry points in Subordinate Judiciary up to district level is concerned. Even if rules under Article 234 can be said to have been framed by the Governor of the concerned State, on a conjoint reading of Articles 234 and 309 the fact remains that

these rules, in order to be effective, have to satisfy the Constitutional requirement of the procedure laid down therein for their promulgation. The alternative contention that when the State sends a proposal to the High Court for introducing reservations, the High Court is bound to carry out the mandate of Articles 15(4), 16(4), 38 and 46 of the Constitution, and should respond with such duty-consciousness, cannot be of any avail on the facts of the present case as we are not concerned with such a situation. The rules framed under Articles 233 and 234 by the Bihar Government in consultation with the High Court are not on the anvil of scrutiny. The only short question with which we are concerned is whether in the absence of appropriate provision being made in these rules, the State Legislature can intervene on its own bypassing the High Court and lay down a rule of thumb by way of fixed quota of reservation in all the posts in the Subordinate Judiciary. The Mandal Commission Report has nothing to do with the question with which we are concerned. Even if adequate representations of reserved category of candidates for appointment to Judiciary may be a laudable object, it has to be kept in view that whatever is right has to be done in a right manner or not at all. Even in the present case 24% reservation for SC and ST candidates at grass-root level in Judiciary has already been agreed to by the High Court and the appointments are accordingly being made since years. The only question is whether by Section 4 of the impugned Act that percentage of reservation can be increased to 50% by bringing other reserved categories like the Other Backward Classes, completely bypassing the High Court and without there being any need to consult it. Such a legislative Act cannot be countenanced on the touchstone of relevant Articles of the Constitution. This question cannot be answered in the light of the supposed Constitutional philosophy underlying the scheme of reservation for weaker sections of the community in general terms. It is now time for us to refer to the judgments of this Court and other High Courts on which reliance was placed by learned counsel for the contesting parties in support of their respective cases. A three-Judge Bench of this Court in the case of M.M.Guptas case (supra), speaking through Shri R.S.Pathak, J (as he then was), while considering the question of independence of judiciary, has clearly ruled that any scheme of appointment to judicial posts by the executive at the State and the Central level, without consulting the High Court, would clearly affect the independence of judiciary. Pertinent observations in this connection are found in paras 33 and 34. The relevant portions thereof read as under:

> .Independence of the judiciary is one of the basic tenets and a fundamental requirement of our Constitution. Various Articles in our Constitution contain the relevant provisions for safeguarding the independence of the Judiciary. Article 50 of the Constitution which lays down that the State shall take steps to separate the judiciary from the executive in the public services of the State, postulates separation of the judiciary from the executive.
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> Unfortunately, for some time past there appears to be an unhappy trend of interference in the matter of judicial appointments by the executive both at the State and the Central level..Article 235 of the Constitution vests the control of judicial administration completely in the High Court excepting in the matter of initial appointment and posting of District Judges and the dismissal, removal or termination of services of these officers. Even in these matters the requirement of the Constitution is that the Governor must act in consultation with the High Court. If in

the matter of appointment, the High Court is sought to be ignored and the executive authority chooses to make the appointment, independence of the judiciary will be affected.

In the light of the aforesaid settled legal position, therefore, there cannot be any escape from the conclusion that if the process of appointment to Subordinate Judiciary at district level or grass-root level is tried to be circumscribed or truncated by any direction as to reservation of available vacancies for a given category of candidates it would certainly impinge upon the power of the High Court in suggesting appointment of suitable candidates to fill up the posts of judicial officers with a view to fructify the goal of furnishing effective mechanism of judicial administration and making the Judiciary fully vibrant, effective and result-oriented. Such an independent Judiciary is the heart of the Constitutional scheme, as already discussed earlier. In the case of All India Judges Association & Ors. (supra), the special features of Judicial Services have been clearly earmarked in the light of Articles 233, 234, 236 and 309. A three-Judge Bench of this Court, speaking through Sawant, J., while disposing of the Review Petitions by the Union of India and Officers of the States, has made the following apposite observations in paras 4 & 5 :

The judicial service is not service in the sense of employment. The judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the council of ministers and the members of the legislature. When it is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the State, what is intended to be conveyed is that the three essential functions of the State are entrusted to the three organs of the State and each one of them in turn represents the authority of the State. However, those who exercise the State-power are the ministers, the legislators and the judges, and not the members of their staff who implement or assist in implementing their decisions. The council of ministers or the political executive is different from the secretarial staff or the administrative executive which carries out the decisions of the political executive. Similarly, the legislators are different from the legislative staff. So also the Judges from the judicial staff. The parity is between the political executive, the legislators and the Judges and not between the Judges and administrative executive. This distinction between the Judges and the members of the other services has to be constantly kept in mind for yet another important reason. Judicial independence cannot be secured by making mere solemn proclamations about it. It has to be secured both in substance and in practice. It is trite to say that those who are in want cannot be free. Self-reliance is the foundation of independence. The society has a stake in ensuring the independence of the judiciary, and no price is too heavy to secure it. To keep the judges in want of the essential accoutrements and thus to impede them in the proper discharge of their duties is to impair and whittle away justice itself. (para 4) It is high time that all concerned appreciated that there cannot be any link between the service conditions of the judges and those of the members of

the other services. It is true that under Art.309 of the Constitution, the recruitment and conditions of service of the members of the subordinate judiciary are to be regulated by the Acts of the appropriate legislature and pending such legislation, the President and the Governor or their nominees, as the case may be, are empowered to make rules regulating their recruitment and the conditions of service. It is also true that after the Council of States makes the necessary declaration under Art.312, it is the Parliament which is empowered to create an All India Judicial Service which will include posts not inferior to the post of District Judge as defined under Art.236. However, this does not mean that while determining the service conditions of the members of the Judiciary, a distinction should not be made between them and the members of the other Services or that the service conditions of the members of all the Services should be the same. As it is, even among the other Services, a distinction is drawn in the matter of their service conditions. The linkage between the service conditions of the judiciary and that of the administrative executive was an historical accident. The erstwhile rulers constituted, only one service. Viz., the Indian Civil Service for recruiting candidates for the Judicial as well as the Administrative Service and it is from among the successful candidates in the examination held for such recruitment, that some were sent to the administrative side while others to the judicial side. Initially, there was also no clear demarcation between the judicial and executive services and the same officers used to perform judicial and executive functions. Since the then government had failed to make the distinction between the two services right from the stage of the recruitment, its logical consequences in terms of the service conditions could not be avoided. With the inauguration of the Constitution and the separation of the State power distributed among the three branches, the continuation of the linkage has become anachronistic and is inconsistent with the constitutional provisions. The parity in status is no longer between the Judiciary and the administrative executive but between the judiciary and the political executive. Under the Constitution, the judiciary is above the administrative executive and any attempt to place it on par with the administrative executive has to be discouraged. The failure to grasp this simple truth is responsible for the contention that the service conditions of the judiciary must be comparable to those of the administrative executive and any amelioration in the service conditions of the former must necessarily lead to the comparable improvement in the service conditions of the latter. (para 5) In our view, the aforesaid decision of the three Judge Bench on the relevant scheme of the Constitution, especially, Articles 234 to 236 and 309 remains well sustained and clearly indicates how Judicial Service, though being a part of the general Service of the State, stands of its own and cannot countenance any encroachment on it as it is based on the principle of independence of Judiciary from the executive and/or legislative save and except to the limited extent permitted by second part of Article 235 of the Constitution. Otherwise the basic feature of independence of Judiciary will get eroded. The submission of Shri Dwivedi in this connection that, even Tribunals have got trappings of judicial power and decide lis between the parties also is besides the point while considering the question as to how appointments to the lower Judiciary in the strict sense of the term is to be effected.

> Once on this aspect the Constitutional scheme is clear, it has got to be given its full effect. We may now refer to Judgments of some of the High Courts to which our attention was invited by learned senior counsel Shri Thakur for the respondent High Court. In the case of K.N.Chandra Sekhara & Ors. vs. State of Mysore & Ors., AIR 1963 Mysore 292 (V 50 C 68), a Division Bench of the High Court of Mysore was concerned with the question whether contrary to the statutory rules framed by the Governor under Article 234 read with Article 309 of the Constitution of India, laying down the criteria for recruitment to the cadre of Munsiffs in Judicial Service of the State, the Public Service Commission of its own can fix different criteria of passing marks for candidates belonging to SC and ST as compared to higher passing marks for general category of candidates. Answering this question in the negative, Somnath Iyer, J., speaking for the Division Bench observed that : Article 234 excepts out of the operation of Art.309, appointments to Judicial Service and constitutes the Governor in a sense a select legislative organ for enactment of rules for that purpose.

The aforesaid observations will, of course, have to be read down in the light of the Constitution Bench decision of this Court in B.S.Yadavs case (supra). The next Judgment placed for our consideration by Shri Thakur is another Division Bench judgment in M.I.Nadaf vs. The State of Mysore & Anr., AIR 1967 Mysore 77 (V 54 C 21). In that case another Division Bench of the Mysore High Court, speaking through K.S.Hegde, J. (as he then was), had to consider the question whether once rules are framed under Article 234 read with Article 309 of the Constitution of India for governing the recruitment of Munsiffs any other independent rule pertaining to general conditions of Service and laying down a different eligibility criterion for a candidate to be considered for such recruitment could be countenanced. In that case, the general rules framed under Article 309 applicable to all State Services permitted clubbing of temporary Service of candidates under the Government or holding a post under local authority with the Service on regular basis for deciding about the requisite experience of the concerned candidate for such posts. Though the General Rules provided to the aforesaid effect, the rules framed under Articles 234 and 309 did not do so. Question was whether the General Rules could cut across the rules framed under Article 234, the former not having been made in consultation with the High Court. Negativing the contention that these General Rules which were framed under Article 309 without reference to the High Court could operate in connection with appointment of judicial officers at grass-root level as governed by the rules under Article 234, Hegde, J., made relevant observations in this connection at pages 78 and 79 in paras 9 and 10 of the Report as under :

> Article 309 of the Constitution empowers the Governor to make rules regulating the recruitment and the conditions of services of persons appointed to the Civil Services of the State. But that Article, as its opening words themselves indicate, is subject to the other provisions of the Constitution. Article 234 is one such provision. The power of the Governor to make rules under Article 309 of the Constitution is not only subject to the other provisions of the Constitution, but it is also subject to any Act of the appropriate Legislature. But the rules to be made by him under Article 234 are not subject to any Act that may be enacted by the appropriate Legislature. But they can be made only after consultation with the State Public Service Commission and

the High Court. The consultation with the High Court is not something nominal. It is the very essence of the matter. It must be borne in mind that our Constitution visualises the separation of the judiciary from the executive. It is no doubt true that the judicial service is also one of the States services. But it has got its own individualistic character. Unlike the other services of the State, the judicial service is expected to be independent of the executive. Often times, it has to pronounce on the correctness or the legality of the action taken by the other services of the State. There are occasions when it is required to pronounce on the legality of an action taken by the Government or even the Governor. Such being the case, it would not be proper to consider the judicial branch as being just one of the branches of the State. It is for that reason, the Constitution makers thought it proper to make separate provisions for the appointment of judicial Officers.

..Our view that appointments to judicial services of the State other than that of the District Judges should be made only in accordance with the rules made by the Governor under Article 234 of the Constitution after consultation with the State Public Service Commission and the High Court exercising jurisdiction in relation to such State and not under rules framed by him under Article 309 of the Constitution is also supported by the decision of the Madras High Court in N. Devasahayam v. State of Madras, AIR 1958 Mad 53 and that of the Rajasthan High Court in Rajvi Amar Singh v. State of Rajasthan, AIR 1956 Raj 104.

In our view, the aforesaid decision of the Mysore High Court is well sustained in the light of the Constitutional scheme as culled out by a series of decisions of this Court to which we have made reference earlier.

A Division Bench of the Orissa High Court in the case of Manoj Kumar Panda vs. State of Orissa & Ors., 1982 Lab.I.C. 1826, speaking through R.N.Misra, CJ. (as he then was) had to consider an identical question which is posed for our consideration in the present proceedings. The Orissa Judicial Service Rules framed under Article 234 read with Article 309 provided a scheme of reservation for SC and ST candidates. The said scheme was tried to be cut across by the Orissa Legislature by enacting the Orissa Act 38 of 1975. Question was whether such a legislative exercise dehors Article 234 and in exercise of powers under Articles 245 and 246 was permissible. Even though parties had settled their dispute, the High Court examined this vital question of great public importance which may ex-facie be treated to be a obiter decision but which, in our view, is fully sustained by the Constitutional scheme examined by us in the present case in the light of decided cases of this Court. It was observed, in this connection, by Misra, CJ, in para 5 of the Report as under : The Orissa Rules of 1964 are specially made for recruitment to judicial service.

And since in some Articles of the Constitution rules have been made subject to legislation while in other Articles like Art.234, the rules have not been made subject to legislation, a distinction must be maintained between the two sets of rules. Where the Constitution specifically vests power in the

Governor to make rules and does not make his rules subject to legislation, it must follow that the Constitution has intended those rules to be final on the subject specified.

Thus, in view of the specific provision in Art.234 authorising the Governor to make rules for the purpose of appointment and in the instant case such rules having been made viz. Orissa Rules of 1961, it must follow that the power given to the State Legislature under Arts.234, 245, and 246 (3) of the Constitution would be subject to the provisions of Art.234, in view of a non obstante clause appearing at the beginning of Art.245(1). And in the result Orissa Act 38 of 1975 is not to apply to judicial service covered by Art.234 of the Constitution so far as appointment is concerned.

A similar view is also taken by the Allahabad High Court in the case of Farzand vs. Mohan Singh & Ors., AIR 1968 All. 67 (V 55 C 18). In para 31 of the Report at page 74 it was observed as under : The intention behind taking out the provisions relating to subordinate courts from Part XIV of the Constitution and putting them in Part VI, seems to be to make the consultation with the High Court in the matter of framing of the rules, really effective and thus to secure the independence of the subordinate Judiciary from executive (See AIR 1966 SC 1987 (Para 14)). Under the proviso to Art.309 the Governor is competent to frame rules relating to recruitment as well as condition of service. The rules made by the Governor operate only until a provision in that behalf is made by an Act of the Legislature. The legislature while making an Act under Art.309 is not required even by Art.234, to consult any one. The provision for consultation with the High Court would become nugatory as soon as the legislature acted to enact. To avoid this and to keep the rules governing recruitment to the judicial service outside the purview of the State legislature, Article 234 was taken out of Part XIV which includes Article 309. Article 309 is subject to the other provisions of the Constitution, which means and includes Article 234. Article 234, on the other hand, is not subject to any other provision of the Constitution. The rules, made under Art. 234, will hence not be subject to any Act of legislature made under Art.309. Then again, if the Governor alone was to frame the rules for recruitment to the judicial service, there was no point in making this invidious distinction between the rules for the judicial and the other services. This distinction became necessary because the rules for the Judicial Service were to be framed in consultation with the High Court. All these aspects of the matter lead to the inevitable view that Article 234 requires consultation with the High Court only in the matter of the making of the rules.

It is now time for us to take stock of the situation. In the light of the Constitutional scheme guaranteeing independence of Judiciary and separation of powers between the executive and the judiciary, the Constitutional makers have taken care to see by enacting relevant provisions for the recruitment of eligible persons to discharge judicial functions from grass-root level of the Judiciary up to the apex level of the District Judiciary, that rules made by the Governor in consultation with the High Court in case of recruitment at grass-root level and the recommendation of the High Court for appointments at the apex level of the District Judiciary under Article 233, remain the sole repository of power to effect such recruitments and appointments. It is easy to visualise that if suitable and competent candidates are not recruited at both these levels, the out turn of the judicial product would not be of that high level which is expected of judicial officers so as to meet the expectations of suffering humanity representing class of litigants who come for redressal of their legal grievances at the hands of competent, impartial and objective Judiciary. The Presiding Officer

of the Court if not being fully equipped with legal grounding may not be able to deliver goods which the litigating public expects him to deliver. Thus, to ensure the recruitment of the best available talent both at grass-root level as well as at apex level of District Judiciary, Articles 233 and 234 have permitted full interaction between the High Court which is the expert body controlling the District Judiciary and the Governor who is the appointing authority and who almost carries out the ministerial function of appointing recommended candidates both by the Public Service Commission and the High Court at the grass-root level and also has to appoint only those candidates who are recommended by the High Court for appointment at the apex level of District Judiciary. Any independent outside inroad on this exercise by legislative enactment by the State Legislature which would not require consultation with an expert agency like the High Court would necessarily fall foul on the touchstone of the Constitutional scheme envisaging insulation of judicial appointments from interference by outside agencies, bypassing the High Court, whether being the Governor or for that matter Council of Ministers advising him or the Legislature. For judicial appointments the real and efficacious advice contemplated to be given to the Governor while framing rules under Article 234 or for making appointments on the recommendations of the High Court under Article 233 emanates only from the High Court which forms the bed- rock and very soul of these exercises. It is axiomatic that the High Court, which is the real expert body in the field in which vests the control over Subordinate Judiciary, has a pivotal role to play in the recruitments of judicial officers whose working has to be thereafter controlled by it under Article 235 once they join the Judicial Service after undergoing filtering process at the relevant entry points. It is easy to visualise that when control over District Judiciary under Article 235 is solely vested in the High Court, then the High Court must have a say as to what type of material should be made available to it both at the grass-root level of District Judiciary as well as apex level thereof so as to effectively ensure the dispensation of justice through such agencies with ultimate object of securing efficient administration of justice for the suffering litigating humanity. Under these circumstances, it is impossible to countenance bypassing of the High Court either at the level of appointment at grass-root level or at the apex level of the District Judiciary. The rules framed by the Governor as per Article 234 after following due procedure and the appointments to be made by him under Article 233 by way of direct recruitment to the District Judiciary solely on the basis of the recommendation of the High Court clearly project a complete and insulated scheme of recruitment to the Subordinate Judiciary. This completely insulated scheme as envisaged by the founders of the Constitution cannot be tinkered with by any outside agency dehors the permissible exercise envisaged by the twin Articles 233 and 234. It is a misnomer to suggest that any imposition of scheme of reservation for filling up vacancies in already existing or created sanctioned posts in any cadre of district judges or Subordinate Judiciary will have nothing to do with the concept of recruitment and appointment for filling up such vacancies. Any scheme of reservation foisted on the High Court without consultation with it directly results in truncating the High Courts power of playing a vital role in the recruitment of eligible candidates to fill up these vacancies and hence such appointments on reserved posts would remain totally ultra vires the scheme of the Constitution enacted for that purpose by the founding fathers. It is also to be noted that the concept of social justice underlying the scheme of reservation under Article 16(4) read with Article 335 cannot be said to be one which the High Court would necessarily ignore being a responsible Constitutional functionary. In fact what is required is that the right decision should be arrived at in the right manner. In the facts of the present case, it is an admitted position that the High Court of Patna has already consented to have 14% reservation for

SC candidates and 10% reservation for ST candidates in recruitment of Munsiffs and Magistrates at grass-root level of Subordinate Judiciary and rules framed under Article 234 by the Governor of Bihar in consultation with the High Court have permitted such reservation. Thus, it is not as if the purpose of reservation cannot be achieved without reference to the High Court. But as the saying goes you can take a horse to the water but cannot make it drink by force . Thus what is expected of the executive and the Governor is to have an effective dialogue with the High Court so that appropriate reservation scheme can be adopted by way of rules under Article 234 and even by prescribing quota of reservations of posts for direct recruits to District Judiciary under Article 233 if found necessary and feasible. That is the Constitutional scheme which is required to be followed both by the High Court and by the executive represented through the Governor. But this thrust of the Constitutional scheme cannot be given a go-bye nor can the entire apple-cart be turned topsy-turvey by the legislature standing aloof in exercising its supposed independent Legislative power dehors the High Courts consultation.

Leaving aside this question even on the express language of the impugned Section 4 of the Act, argument of learned senior counsel for the appellant- State would fall through as the said Section does not envisage creation of separate category of posts for reserved category of candidates in the existing cadres of District Judges and Subordinate Judges. On the contrary, that Section postulates available vacancies in the already existing posts in the cadres and tries to control appointments to such existing posts in the vacancies falling due from time to time by adopting the rule of thumb and a road-roller provision of 50% vacancies to be reserved for reserved category candidates, meaning thereby, the Section mandates the High Court and that too without consulting it, that it shall not fill up 50% of available vacancies by selected candidates standing in the order of merit representing general category candidates and must go in search of less meritorious candidates for filling up these vacancies supposedly reserved for them. Such a scheme can be envisaged only under relevant rules framed under Articles 233 and 234 after consultation with the High Court and cannot be made the subject matter of any legislative fiat which the High Court is expected to carry out willy-nilly and dehors the Constitutional scheme regarding full and effective consultation with the High Court in this connection. It must, therefore, be held that the impugned Section 4, as existing on the statute book if allowed to operate as it is for controlling recruitment to the posts of district judges as well as to the posts in Judiciary subordinate thereto to the district courts, would directly conflict with the Constitutional scheme of Articles 233 and 234 constituting a complete Code and has to be treated as ultra vires the said Constitutional scheme. Before parting with the discussion on this point, we may mention that in the impugned judgment of the High Court in CWJC No.6756 of 1994 the learned Judges have considered the question of reservation of posts in Judicial Service dehors the Reservation Act in paragraphs 16 to 21 of the judgment. Placing reliance on a decision of the Constitution bench Judgment of this Court in Supreme Court Advocates-on-Record Association & Anr. vs. Union of India, AIR 1994 SC 268, it has been observed that whenever such a question arises and any scheme of reservation is sought to be introduced by the Governor in consultation with the High Court, the opinion of the High Court shall have primacy. We may mention that this question strictly does not arise for our consideration in the present proceedings for the simple reason that legality of rules of reservation, if any, framed by the Governor under Article 309 read with Articles 233 and 234 introducing a scheme of reservation contrary to the consent of the High Court has not arisen for decision. In the present proceedings, we are concerned with the short question whether

totally bypassing the High Court, the State Legislature can enact a statutory provision introducing a scheme of reservation in Judicial Service comprised of District Judges cadre as well as cadre of Judges subordinate thereto. Hence, the aforesaid observations of the High Court, in our view, were not called for in the present case and we express no opinion thereon.

Point no.2, therefore, will have to be answered in the affirmative against the appellant-State and in favour of the respondent.

Point No.3: In the light of our answer to point no.2, the question survives for consideration as to what appropriate orders can be passed in connection with the impugned Section 4 of the Act. Now it must be kept in view that Section 4, as enacted in the Act, can have general operation and efficacy regarding other Services of the State not forming part of Judicial Service of the State. Qua such other services Section 4 can operate on its own and in that connection consultation with the High Court is not at all required. However, in so far as it tries to encroach upon the field of the recruitment and appointment to Subordinate Judicial Service of the State as envisaged by Articles 233 and 234 it can certainly be read down by holding that Section 4 of the impugned Act shall not apply for regulating the recruitment and appointments to the cadre of District Judges as well as to the cadre of Judiciary subordinate to the District Judges and such appointments will be strictly governed by the Bihar Superior Judicial Service Rules, 1951 as well as by the Bihar Judicial Service (Recruitment) Rules, 1955. In other words, Section 4 will not have any impact on these rules and will stand read down to that extent. Once that is done, question of striking down the said rule from the statute book would not survive and would not be required. We, accordingly, read it down as aforesaid. Point no.3 is answered accordingly in favour of the respondent and against the appellant-State. Point No.4:

> Now the stage is reached for passing appropriate final orders in the light of our answers to the aforesaid points. The impugned judgments of the High Court in both these appeals allowing the writ petitions are sustained subject to the following modifications and directions : 1. Even though the impugned Act, as framed, is held to be applicable even to Judicial Service, Section 4 thereof in particular laying down scheme of reservation, will not apply for governing the recruitment to the cadre of District Judiciary as well as to the cadres of Judiciary Subordinate to the District Judges. 2. The observation of the High Court in the impugned judgement in Civil Appeal No.9072 of 1996 to the effect that if two candidates, one belonging to general category and another to reserved category are found to be equally meritorious, preference can be given to reserved category candidate is the only rational scheme envisaged by the Constitution, being an unnecessary one will be treated to be of no legal effect. 3. Despite the aforesaid observations, the stand of the respondent High Court that for recommending direct recruitment of advocates as District Judges the suggested preference to be given to reserved category candidate of equal merit with general category candidate has to be followed by the High Court as agreed to in the present proceedings till appropriate scheme of reservation for reserved category candidates if any is promulgated by the Governor by framing appropriate rules in consultation with the High Court and the same procedure will have to be followed by the High Court till then. Once such a scheme after proper dialogue with the High

Court is promulgated by amending the relevant rules then obviously the High Court even while recommending recruitment to the posts of District Judges from members of the Bar as per Article 233(2) will be bound by such a scheme of reservation. 4. For governing direct recruitment at grass-root level as per the Bihar Judicial Service (Recruitment) Rules, 1955, 14% reservation for SC and 10% reservation for ST candidates shall be followed by all concerned acting under the said rules and appointments at the grass-root level of Judiciary shall be made following the said scheme of reservation until any other scheme of reservation is promulgated by amending the relevant rules by the Governor after effective consultation with the High Court as envisaged by Article 234 read with Article 309. 5. By an interim order dated 16.11.1995 in the Civil Appeal arising out of SLP(C) No.16476 of 1993 it was directed as under : Having heard counsel representing different interests we modify the order dated 13.5.94 whereby it was stated that while the process of selection may go on but actual appointment orders should not be issued. If the selection process is over the selectees may be appointed subject to the result of this petition and further subject to the seniority that may be required to be adjusted if reservation is upheld and candidates to fill in the reserved slots are selected at any time hereafter and become entitled to appointments. However, question of filling up the reserved posts will not arise and they shall remain in abeyance but if after this Court decides the issue on reservation in the instant case and selections are made even thereafter and appointments are made, they will be entitled to their respective seniorities at the slots available as on the date of appointment of General Category candidates.

In this appeal, the appointments of candidates as per 1955 Rules to the posts of Subordinate Judges and Munsiffs are on the anvil of consideration. The writ petition filed by the original writ petitioners before the High Court will stand partly allowed by holding that Section 4 of the impugned Act does not apply to these recruitments and the scheme of reservation of 14% for SCs and 10% for STs only will apply to such recruitment. As a result, the question of filling up of reserved posts in this case will remain germane to the aforesaid extent of permissible reservation of 24% for SC and ST candidates. The concerned authorities will work out the rights of the selected candidates for being appointed to these posts governed by the Bihar Judicial Service (Recruitment) Rules, 1955 accordingly, keeping in view the directions contained in the interim order of this Court dated 16.11.1995. 6. Both these appeals are accordingly dismissed subject to the aforesaid modifications and directions. There will be no order as to costs in both these appeals.

New Delhi, March 14, 2000 IN THE SUPREME COURT OF INDIA CIVIL APPELLATE JURISDICTION CIVIL APPEAL NO.9072 OF 1996 State of Bihar & Anr. ....Appellant Versus Bal Mukund Sah & Ors. ....Respondents (With CA No...../2000 @ SLP (C) No.16476/93) PATTANAIK, J.

I have gone through the two learned judgments, one of Brother Majmudar, J. and the other of Brother Sethi, J. expressing divergent views on the question at issue, and I

entirely agree with the conclusions arrived at by Brother Majmudar,J. and respectfully differ from the views expressed by Brother Sethi,J. But in view of the importance of the question I would like to add few paragraphs of my own.

The question for consideration is whether the State Legislature could enact a law in exercise of their powers under article 309 of the Constitution in relation to the recruitment and laying down the conditions of service of the officers belonging to the Judicial Services of the State? It is in this context the further question that arises for consideration is whether the provisions of the Bihar Reservation of Vacancies in Posts and Services (for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1991 (hereinafter referred to as the Act) (Bihar Act 3 of 1992) as amended by Bihar Act 11 of 1993, providing reservation to the extent mentioned in Section 4 would apply to the Judicial Services of the State in view of the definition of State in Section 2(m) of the Act. The answer to these questions depend upon an analysis of the Constitutional Scheme and how the founding fathers intended to have separate provisions for the judicial wing of the State. In fact when the question of appointment of persons to the post of District Judges and post subordinate thereto were being considered and had been engrafted in the Draft Constitution under article 209-A to 209-F, Dr. B.R. Ambedkar in his Speech in the Constituent Assembly had categorically stated, the object of these provisions is two- fold: first of all, to make provision for the appointment of district judges and subordinate judges and their qualifications. The second object is to place the whole of the civil judiciary under the control of the High Court. The only thing which has been excepted from the general provisions contained in article 209-A, 209-B and 209-C is with regard to the magistracy, which is dealt with in article 209-E. The Drafting Committee would have been very happy if it was in a position to recommend to the House that immediately on the commencement of the Constitution, provisions with regard to the appointment and control of the Civil Judiciary by the High Court were made applicable to the magistracy. But it has been realised, and it must be realised that the magistracy is intimately connected with the general system of administration. We hope that the proposals which are now being entertained by some of the provinces to separate the judiciary from the Executive will be accepted by the other provinces so that the provisions of article 209-E would be made applicable to the magistrates in the same way as we proposed to make them applicable to the civil judiciary. It has been felt that the best thing is to leave this matter to the Governor to do by public notification as soon as the appropriate changes for the separation of the judiciary and the executive are carried through in any of the province. Thus it is apparent how anxious the founding fathers of the Constitution were to insulate the judicial wing of the State from the other wings. When Pt.Hirday Nath Kunzru moved some amendments to article 209-A, as it stood in the Draft Constitution, he had indicated that the very object of amendments is for the purpose that though the Governor will appoint District Judges in consultation with the High Court but once such appointment is made by the Governor the District Judge would remain under the control of the High Court. It is not necessary to delve into the reaction of other

Members of the Constituent Assembly at that point of time in as much as almost all the Members had felt the necessity of making separate provisions for the judicial wing of the State as far as practicable and to vest the entire control with the High Court of the State. In fact Dr. Ambedkar himself had indicated that there is nothing revolutionary in the provisions of the Constitution relating to the sub-ordinate courts of the States and in fact those provisions were there in the Government of India Act, 1935. With this background in mind if we look at the Constitutional Scheme we find Part XIV consisting of articles 308 to 323 deal with the services under the Union and the States whereas Chapter VI containing articles 233 to 237 deal with the Subordinate Courts. Under article 233, the power of appointment, posting and promotion of district judges in any State has been conferred on the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. It obviously deals with those officers who are to be promoted to the rank of district judge in the superior judicial service from the post of subordinate judge. Sub-article (2) of article 233 of the Constitution makes provision for appointment of a person as a district judge direct on the recommendation of the High Court concerned. Article 234 of the Constitution provides for recruitment of persons other than district judges to the judicial service of the State and the same 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 exercising jurisdiction in relation to such State. Article 235 deals with control over the subordinate courts and there is not an iota of doubt that the control over district courts and courts subordinate thereto vest with the High Court and such control must be one which is real and effective and there cannot be any dilution in that respect. It is to be borne in mind that in the Constitutional Scheme in Chapter VI the Founding Fathers have dealt with the question of recruitment and not other conditions of service, such as the age of superannuation, the pay, the pension and allowances, so on and so forth. While Article 309 deals with recruitment and conditions of service of persons serving the Union or the State, a particular category of post forming the judicial wing has been carved out in Chapter VI in Articles 233 to 235 so far as the question of recruitment is concerned. When Article 309 itself uses the expression subject to the provisions of this constitution it necessarily means that if in the constitution there is any other provision specifically dealing with the topics mentioned in said Article 309, then Article 309 will be subject to those provisions of the Constitution. In other words, so far as recruitment to the judicial services of the State is concerned, the same being provided for specifically in Chapter VI under Articles 233 to 237, it is those provisions of the Constitution which would override any law made by the appropriate legislature in exercise of power under Article 309 of the Constitution. The State legislature undoubtedly can make law for regulating the conditions of services of the officers belonging to the judicial wing but cannot make law dealing with recruitment to the judicial services since the field of recruitment to the judicial service is carved out in the Constitution itself in Chapter VI under Articles 233 to 236 of the Constitution.

It would be appropriate to notice at this stage while in Articles 145(1), 148(5), 187(3), 229(2), 283(1) and (2), the Constitution itself make the provision subject to the provisions of law made by the Parliament but Article 234 is not subject to any legislation to be made by the appropriate legislature, which indicates that so far as recruitment to the Judicial Service is concerned which is engrafted in Article 234, the same is paramount and the power of legislature to make law under Article 309 will not extend to make a law in relation to recruitment, though in relation to other conditions of service of such judicial officers, the appropriate legislature can make a law. In fact in B.S. Yadavs case 1981(1)SCR 1024, on which Dr. Dhawan, appearing for the State of Bihar, heavily relied upon Chief Justice Chandrachud, had noticed to the effect- Whenever, it was intended to confer on any authority the power to make any special provisions or rules, including rules relating to conditions of service, the Constitution has stated so in express terms. See, for example Articles 15(4), 16(4), 77(3), 87(2), 118, 145(1), 146(1) and (2), 148(5), 166(3), 176(2), 187(3), 208, 225, 227(2) and (3) and 229(1) and (2), 234, 237 and 283(1) and (2). The observation has been made in the context of the question whether Article 235 confers any power on the High Court to make Rules relating to the Conditions of Judicial Officers attached to the District Courts and the Courts subordinate thereto. The very fact that the framers of the Constitution in enacting Article 234 have made the provision, not subject to any acts of the appropriate legislature is the clearest indication of the Constitution makers that so far as the recruitment to the Judicial Service of the State is concerned, the State Legislature do not possess the necessary power to make law. At the cost of repetition, it may be stated that the expression recruitment and the expression other conditions of service are two distinct connotations in the service jurisprudence and the framers of the Constitution have also born that in mind while engrafting Articles 234 and 309 of the Constitution. It is true that Article 233 dealing with appointment of District Judges does not indicate conferment of power to make Rules for appointment. But the language of article 233 indicates that the entire matter of recruitment to the post of District Judge, either by way of direct recruitment or by promotion is left to the High Court and it is the Governor of the State who is required to make such appointment in consultation with the High Court. So far as direct recruitment is concerned, the Constitution itself lays down certain criteria for making a person eligible for being appointed/recruited as a District Judge. The entire field of recruitment is left to the two Constitutional consultees and obviously, the opinion of the High Court in such matter must be of binding effect. For direct recruitment to the post of District Judges in sub-Article (2) of Article 233, the Constitution itself has indicated the eligibility criteria and the source of recruitment, leaving the manner of final selection with the High Court itself. The argument of Dr. Rajiv Dhawan, in this context that it would be anomalous that whereas for subordinate judiciary, the legislature has no power to make law to deal with the recruitment, whereas for District Judges, the legislature has such power, is devoid of substance inasmuch as under Article 233, both under Clause (1) as well as Clause (2) though the appointment has to be made by the Governor but it is the High Court, who has to decide as to who would be appointed and this also fits in with the

> underlying principles under Article 235 of the Constitution. With reference to second part of Article 235, Dr. Dhawan had also raised the contention that it pre-

supposes that the legislature does possess the power to make law, conferring a right to appeal to an officer of the judiciary of the State, though, control over District Courts and Courts sub-ordinate thereto vests with the High Court. But this contention does not take into account the distinction between the two connotations namely recruitment and conditions of service. The second part of Article 235 protecting a right of appeal which an officer may have under any law made by the legislature or Governor relates to regulating the conditions of service and not in relation to recruitment of the said officer. An ingenious argument had been advanced by Dr. Dhawan to the effect that Article 234 expressly uses the expression that the appointment has to be made in accordance with the Rules to be made by the Governor in consultation with the State Public Service Commission and with the High Court, thereby is referable to proviso to Article 309 and, therefore, the plenary power of the legislature under main Article 309 is not whittled down in any manner. But this argument over- looks the fact that the law made by the legislature under the main part of Article 309 and the law made by the Governor under the proviso stands on the same footing. At this stage, it would be appropriate to notice the argument advanced by Mr. Dwivedi, the learned counsel appearing for the State of Bihar in one of these appeals to the effect that the appropriate act of the State Legislature providing for reservation in the services of the State is a stage prior to the recruitment or appointment and, therefore the power of recruitment in Article 234 is not in any way infringed. This contention would not stand a moment scrutiny in view of the language of Section 4 of the Act itself.

4.Reservation for direct recruitment - All appointments to services and posts in an establishment which are to be filled by direct recruitment shall be regulated in the following manner, namely:-

> (1) The available vacancies shall be filled up- (a) from open merit category .. 50% (b) from reserved category .. 50% (2) The vacancies from different categories of reserved candidates from amongst the 50% reserved category shall, subject to other provisions of this Act, be as follows:-
>
> (a) Scheduled Castes .. 14% (b) Scheduled Tribes ..

10% (c) Extremely Backward Class .. 12% (d) Backward Class .. 8% (e) Economically Backward Woman .. 3% (f) Economically Backward .. 3% ---------- Total .. 50%.

Provided that the State Government may, by notification in the official Gazette, fix different percentage for different districts in accordance with the percentage of population of Scheduled Castes/Scheduled Tribes and other backward classes in such districts:

> Provided further that in case of promotion, reservation shall be made only for Scheduled Castes/Scheduled Tribes in the same proportion as provided in this section.

(3). A reserved category candidate who is selected on the basis of his merit shall be counted against 50% vacancies of open merit category and not against the reserved category vacancies.

(4) Notwithstanding anything contained to the contrary in this Act or in any other law or rules for the time being in force, or in any judgment or decree of the Court, the provision of sub-section (3) shall apply to all such cases in which all formalities of selection have been completed before the 1st November, 1990, but the appointment letters have not been issued.

(5) The vacancies reserved for the Scheduled Castes/Scheduled Tribes and other Backward Classes shall not be filled up by candidates not belonging to Scheduled Castes/Scheduled Tribes and other Backward Classes except as otherwise provided in this Act. (6) (a) In case of non-availability of suitable candidates from the Scheduled Castes and Scheduled Tribes for appointment and promotion in vacancies reserved for them, the vacancies shall continue to be reserved for three recruitment years and if suitable candidates are not available even in the third year, the vacancies shall be exchanged between the Scheduled Castes and Scheduled Tribes and the vacancies so filled by exchange shall be treated as reserved for the candidates for that particular community who are actually appointed.

(b) In case of non-availability of suitable candidates from the Extremely Backward Classes and Backward Classes the vacancies so reserved shall continue to be reserved for them for three recruitment years and if suitable candidates are not available even in the third year also, the vacancies shall be filled by exchange between the candidates from the extremely Backward and Backward Classes and the vacancies so filled by Exchange shall be treated as reserved for the candidates of that particular community who are actually appointed.

(c) In case of non-availability of suitable candidates for the vacancies reserved for the economically backward women the vacancies shall be filled first by the candidates from the Scheduled Castes, then by the candidates from the Scheduled Tribes, then by the candidates from extremely backward class and then by the candidates from backward class. The vacancies so filled in the transaction shall be treated as reserved for the candidates of that particular community who are actually appointed.

(d) If in any recruitment year, the number of candidates of Scheduled Castes/Scheduled Tribes, extremely Backward and Backward Classes are less than the number of vacancies reserved for them even after exchange formula the remaining backlog vacancies may be filled by general candidates after deserving them but the vacancies so deserved shall be carried forward for three recruitment years. (e) If the required number of candidates of Scheduled Castes, Scheduled Tribes and Extremely Backward and Backward Classes are not available for filling up the reserved vacancies, fresh advertisement may be made only for the candidates

belonging to the members of Scheduled Castes, Scheduled Tribes and Extremely Backward and Backward Classes, as the case may be, to fill the backlog vacancies only.

The plain and grammatical meaning of the words used in Section 4 quoted above unequivocally indicates, that it is a law relating to recruitment/appointment and as such once, it is held that the power of recruitment in respect of Judicial Services is provided for in Article 234, the State Legislature in the garb of making law in consonance with Article 16(4) cannot encroach upon Article 234. In course of hearing an elaborate argument had been advanced that reservation is intended to fulfil the Right of Equality under Article 16(1) read with 16(4) and the question whether there has been adequate representation of a particular backward class of citizens has been left to the satisfaction of the State Government in Article 16(4) and, therefore, the State Legislature cannot be denuded of its right to make such law to fulfil the aforesaid Constitutional mandate. We really fail to understand as to why the legislature would feel that the Governor, when frames rules in consultation with the High Court and the Public Service Commission under Article 234 will not take into consideration the constitutional mandate under Article 16(1) or Article 16(4). In fact in the case in hand in the Bihar Judicial Service Recruitment Rules, 1955, reservations have been provided for Scheduled Caste and Scheduled Tribe candidates and the Full Court of Patna High Court have also adopted the percentage of reservation for these candidates as per the notification of the State Government. So far as the Superior Judicial Service is concerned, it is of course true that there has been no provision for reservation. But such provision could always be made by the Governor in consultation with the High Court, also bearing in mind the mandate of Article 335, namely Maintenance of Efficiency of Administration. It is indeed painful to notice, some times law makers unnecessarily feel that the High Court or the Judges constituting the High Court are totally oblivious to the Constitutional mandate underlying Article 16 and more particularly, Article 16(4). It is also not appropriate to think that the High Court will not take into consideration the provisions of Article 16(1) and 16(4) while considering the case of recruitment to the judicial services of the State. The Judiciary is one of the three limbs of the Constitution and those who are entrusted with the affairs of administration of justice must be presumed to have greater expertise in understanding the Constitutional requirements. In this view of the matter the contention of Mr. Dwivedi, appearing for the State of Bihar is unfounded.

In the aforesaid premises, in my considered opinion, the provisions of Bihar Reservation of Vacancies in Posts and Services (for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1991 has no application to the recruitment of judicial officers in the State of Bihar.

BANERJEE, J.

I have had the privilege of going through the judgments of Brother Majmudar and Brother Sethi expressing however, two different and divergent views in regard to the issues raised in the Appeals before us. I have also the privilege of going through the judgment of Brother Pattanaik, recording his concurrence with Brother Majmudar and differing from the views expressed by Brother Sethi. I also record my concurrence with the views expressed by Brother Majmudar but I wish to add a few lines without dilating on to the points delved into both by Brother Majmudar and Brother Pattanaik in

expression of my opinion in the matter in issue.

The Bihar Reservation of Vacancies in Posts and Services (for Scheduled Castes, Scheduled Tribed and Other Backward Classes) Act, 1991 as amended by Bihar Act 11 of 1993, in particular Section 4 thereof is the issue in controversy. The exact language of Section 4 has already been noticed by both Brother Majmudar and Brother Pattanaik in their judgments and as such to avoid the length of the judgment again. I retrain myself from quoting the same excepting, recording however, that Section 4 of the Act of 1991 covers the filed of reservation for direct recruitment to the extent of 50% from the open merit category and 50% from the reserved category and the effort on the part of the State legislature to include the judiciary within the ambit of Section 4 stands negated by the High Court and hence the Appeal before this Court. The core question that needs to be answered is whether Judicial Service comes within the ambit of Acticle 309 so as to clothe the State legislature with the power of legislation and it is in this context that heading of Acticle 309 lends some assistance in the matter which reads; "Recruitment and conditions of Service of persons serving the Union or a State" Article 309 thus, is restrictive to recruitment and conditions of service of persons. In any event the founding fathers of out Constitution with due care and caution introduced this Article subject however, to the other provisions in the Constitution. The opening words of the Article is to be noticed since any rule in terms of the rule making power as conferred by the proviso to the Article if contravenes any of the provision of the Constitutioin, the rule cannot but be ascribed to be viod the reason being express words used by the makers of Constitution subject to the provisions and by reason of existence of a specific provision in regard thereto. It is an authorisation for the legislature to legislate relating to recruitment and conditions of service provided there is existing no specific provision in regard thereto. Needless to record here that Article 309 falls under Part XIV of the Constitution under the lead "Services under the Union and States" and relying theron Dr. Dhawan appearing in support of the Appeal contended that since judiciary is an organ of the State question of taking it out of the ambit of Article 309 would not arise. The constitutional scheme however, runs in direct conflict with the submission of Dr. Dhawan. Articles 233 to 237 falls under Chapter VI of Constitutioin with a heading - 'Subordinate Court' . The headings of Articles 233, 233A, 234, 235 in this context are of some effect and consequence and as such, the same are noted hereinbelow:

> "233. Appointment of District Judges".
>
> "233A. Validation of appointment of and judgments etc., delivered by, certain District Judges.
>
> "234. Recruitment of persons other than District Judges to the Judicial Service".
>
> "235. Control over subordinate courts".

Be it noted that whereas Chapter V of the Constitution deals with the High Court in the State, Chapter VI as noticed above deals with Subordinate Courts; the scheme of the Constitution thus, is categorical enough to depict the judiciary as a specific class by itself being an independent third wing of democratic polity. The appointment of district judges though conferred in terms of Articles 233 of the Constitution on to the Governor of the State but the "Consultation with the High Court

exercising jurisdiction in relation to such a State" has been inserted in order to obviate any controversy as to the efficiency of the officers who are to be promoted to the rank of district judge in the Higher Judicial Service from the post of subordinate Judge. The incorporation of sub-Article 2 as regards a direct recruit district judge on the basis of the recommendations of the High Court for appointment has as a matter of fact cemented the controversy, in the event however, there being any, as regards the method of consultation in matter of appointment of district judges. The further incorporation of Articles 234 and 235 and on a plain reading thereof would leave no manner of doubt as to the separate categorization of judicial officers exclusive to themselves and their appointment independently of Articles 309.

The inclusion of Chapter Vi in the Constitution as a matter of fact records a distinct intention of the framers of the Constitution as regards the supremacy and separateness of the judiciary from the legislature and the executive. If Article 309 is subject to be a general provision, Articles 233 to 235 ought to be treated as specific provisions for appointment of judicial officers and by reason therefor, the specific field of legislation thus stands completed and obviously the framers of the Constitution having provided Articles 233 to 235, introduced in Article 309, the words "subject to the provisions of this Constitution". As a matter of fact the submission in support of the Appeal does not stand to further scrutiny by reason of the fact that in the event of there being any contra intention of the framers, the same would have found an expression in Article 234 itself. The appointment of district judges, in my view, without any hesitation rests with two constitutional functionaries namely, the Governor and the High Court and thus withdrawing the same from the purview of the general power as conferred under Article 309.

On the wake of the aforesaid, judicial service thus, cannot be termed to be covered under Article 309 as regards the appointment thereto though however, other conditions of service specifically left open and thus the authorisation to legislate under Article 309 is available in regard to conditions of service and other incidentals thereto subsequent to the appointment. It may also be noted that General Legislative powers of thee Parliament as well as the State Legislature under Article 245 is expressly made subject to other provisions of the Constitution which would obviously include Articles 233 to 235.

The other aspect of the matter is in regard to Article 16 (4) which Mr. Dwivedi appearing in support of the Appeal in Appeal No.9072/96 contended that reservation is outside the purview of Chapter VI and since Article 16 (4) can be termed to be a basic feature of the Constitution appointments in the posts of district judges ought also to be governed thereunder and not de hors the same. This aspect of the matter however, has been dealt with elaborately by both my learned Brother Majmudar and Brother Pattanaik and as such I do not wish to record any further reasons therefore but adopt the same and hereby record my concurrence therewith. In that view of the matter I would dismiss both Appeals without however, any orderr as to costs.

ORDER Leave granted.

The Civil Appeals stand dismissed as per the majority view subject to the modification and directions contained in thee main judgment.

There will be no order as to costs.

SETHI, J. (For himself & Khare,J.) We have minutely perused the well prepared, lucid and knowledgeable judgment of Brother Majmudar, J. but find it difficult to agree with him on main issues involved in the case, which undoubtedly are of far reaching consequences on the future of the Indian polity. As the interpretation of the various provisions of the Constitution in relation to the independence of judiciary and the sovereign rights of the legislature to make laws with respect to the Judicial Service is likely to affect the constitutional scheme adopted in a Parliamentary democracy, We have opted to write a separate judgment.

Leave granted in SLP 16476 of 1993.

Concededly India is a Parliamentary democracy having an elaborate written Constitution adopted by the people of the country for their governance. The Constitution declares to secure to all citizens of the country, justice, social, economic and political; liberty of thought, expression, belief, faith and worship and equality of status and opportunity. The Parliamentary form of democracy introduced in this country is referable to the West-minister experience of Great Britain. All the basic principles of Parliamentary system practised and followed in United Kingdom were adopted by the founders of the Constitution in our country. The constitutional scheme generally envisages separation of powers which is not synonymous to the "checks and balances"

> as prevalent in the United States Constitutional system. In implementation of the scheme, with respect to separation of powers amongst the main wings of the State, there is overlapping sometimes, even without encroachment as the Constitution is found to contain interactive provisions. The constitutional scheme makes the Executive responsible to the Legislature. The paramount consideration and dominant goal of the Constituent Assembly has been to bring popular people into the Government and make the Government answerable to the representatives of the people. The Indian Parliamentary system adopted and practised for over half a century has, by and large, kept pace with the changing circumstances by embodying innovations and practices to meet the requirements of the changing role of the Parliament. Various provisions made in the Constitution reflect the desire of the nation to have a practicable socio-political-economic system to meet the aspirations of the common man. The system is intended to deliver the goods and services to the satisfaction of the common masses. The constitutional framework envisaging Parliamentary system of governance ensures the establishment of a sovereign, socialist, secular, democratic Republic in the country. It guarantees fundamental rights and mandates the Directive Principles of the State policy. Besides providing a quasi federal system in the country and envisaging the scheme for distribution of legislative powers between the State and the Centre, it emphasizes the establishment of the rule of law. The form of Government envisaged under a Parliamentary system of democracy is a representative democracy in which the people of the country are entitled to exercise their sovereignty through the legislature which is to be elected on the basis of adult franchise and to which the Executive, namely, the Council of

Ministers is responsible. The legislature has been acknowledged to be a nerve centre of the State activities. It is through Parliament that elected representatives of the people ventilate peoples grievances. The Constitution devises the ways and means in its various parts by which each of the three branches of the Government, namely, legislative, executive and judiciary can function without interference of the other by invading others assigned sphere. The doctrine of separation of powers though not strictly accepted yet provides for independent judiciary in the States. This Court in Chandra Mohan vs. State of Uttar Pradesh & Ors. [AIR 1966 SC 1987] held:

"The Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States: it constitutes a High Court for each State, prescribes the institutional conditions of service of the Judges thereof, confers extensive jurisdiction on it to issue writs to keep all tribunals, including in appropriate cases the Governments, within bounds and gives to it the power of superintendence over all courts and tribunals in the territory over which it has jurisdiction. But the makers of the Constitution also realised that it is the Subordinate Judiciary in India who are brought most closely into 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 Ch.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 was based upon the assumption that unless they were separated, the independence of the judiciary at the lower levels would be a mockery. So article 50 of the Directive Principles of Policy states that the State shall take steps to separate the judiciary from the executive in the public services of the States. Simply stated, it means that there shall be a separate judicial service free from the executive control."

The hallmark of the constitutional scheme in the country is the role of judicial review assigned to the courts. Unlike United States our Constitution explicitly empowers the Supreme court and the High Courts to check the actions of the Executive and the Legislature in case of such actions being incompatible with the Constitution. To ensure the existence of an independent, effective and vibrant judiciary provision is made in the Constitution in Part V, Chapter IV dealing with the Union Judiciary, Part VI, Chapter V dealing with the High Courts in the States and Chapter VI dealing with Subordinate Courts. This Court, in various decisions, has highlighted the importance of insulating the judiciary from executive interference to make it effectively independent. In S.P. Gupta vs. Union of India[1982 (2) SCR 365] , Bhagwati, J., as His Lordships then was declared that the principle of independence of judiciary is not an abstract conception but it is a living faith which must derive its inspiration from the constitutional charter and its nourishment and sustenance from the constitutional values. The Indian judiciary was described as a document of social revolution which casts an obligation on every instrumentality including the judiciary which is a separate but equal branch of the State to transform the status quo ante into a new human order in which justice, social,

economic and political will inform all institutions of national life and there will be equality of status and opportunity for all. The British concept of justicing was found to be satisfactory for a stable and static society but not for a society pulsating with urges of gender justice, worker justice, minorities justice, dalit justice and equal justice between chronic unequals. In the words of Glanville Austin, the judiciary has to become an arm of the socio-economic revolution and perform an active role calculated to bring social justice within the reach of the common man. In the instant case the controversy relates to the alleged invasion on the independence of subordinate judiciary defined as judicial service in Article 236 of the Constitution. It is contended that the provisions of Part VI, Chapter VI of the Constitution are to be construed independently ignoring the other constitutional guarantees and provisions made to deal with the public services of the Union and the States as contemplated under Article 309 of the Constitution. On the one hand it is submitted that the said Chapter VI is a self-contained provision with which no interference can be had by any other organ of the State, namely, the executive and the legislature. On the other hand it is contended that conceding that the provisions made in the said Chapter are mandatory, the executive or the legislature is not debarred from supplementing those provisions without transgressing the limit imposed by law or making such provision which may not amount to interference with the judiciary endangering its independence. Divergent views are expressed regarding the nature of service contemplated under Part VI, Chpater VI and the service referred to in Part XIV Chapter I. The impugned Act being Bihar Act No.3 of 1992 is referable to the provisions of Article 309 legislated by the State Legislature in exercise of its powers conferred upon it under Part XI Chpater I read with Schedule VII Entry 41 List II and Entry IIA List III. Section 4 of of the impugned Act deals with and provides reservation in all services including the judicial service. The High Court of Patna has held the aforesaid section to be inapplicable to the judicial service with the result that the appointments to the judicial service have been made without any reservation. Without repeating the facts as narrated in the judgment of Majmudar, J., it is noticed that when the High Court of Patna administratively declined to concede reservation in the judicial services, the State Legislature enacted the impugned Act. Article 233 of the Constitution provides that appointment of District Judges shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. Direct appointment of a person to the post of District Judge can be made only if he has been an Advocate/Pleader for seven years and is recommended by the High Court for appointment. The appointment contemplated under this Article is the initial appointment from direct recruits or initial promotion from the service. The exercise of power of appointment by the Governor is conditioned by his consultation with the High Court which means that he can appoint only such person to the post of District Judge who has been recommended by the High Court. The object of consultation was considered by this Court in Chandra Mohan's case (Supra) wherein it was held: "The Constitutional mandate is clear. The exercise of power of appointment by the Governor is conditioned by his consultation with the High Court that is to say, he can only appoint a person to the post of District Judge in consultation with the High Court. The object of consultation is apparent. The High Court is expected to know better than the Governor in regard to the suitability or otherwise of a person, belonging either to the judicial service or to the Bar, to be appointed as a district judge. Therefore, a duty is enjoined on the Governor to make the appointment in consultation with a body which is the appropriate authority to give advice to him. This mandate can be disobeyed by the Governor in two ways, namely, (i) by not consulting the High Court at all, and (ii) by consulting the High Court and also other persons. In one case he directly

infringes the mandate of the Constitution and in the other he indirectly does so, for his mind may be influenced by other persons not entitled to advice him."

This Court in State of Assam & Anr. vs. Kuseswar Saikia & others [AIR 1970 SC 1616] held that the separate judicial service was provided to make the office of a District Judge completely free of executive control. In Chandramouleshwar Mohan Prasad vs. The Patna High Court & Ors. [AIR 1970 SC 370] this Court held that the underlying idea of Article 233 is that the Governor should make up his mind after there has been a deliberation with the High Court. The High Court is the body which is intimately familiar with the efficiency and quality of officers who are fit to be promoted as District Judges. The High Court alone knows the merits as also their demerits and that the consultation with the High Court under Article 233 is not an empty formality. It is not disputed in this case that the State Legislature had the plenary power to enact the impugned Act under Part XI Chapter I read with 7th Schedule Entry 41 of List II and Entry IIA of List III. It is also not disputed that the said Act has been enacted to give effect to the fundamental rights, the Directive Principles of State Policy and the obligation of the State under Article 335 of the Constitution. The controversy rests upon the interpretation of Articles 233, 234, 235 and 309 of the Constitution. The High Court held that the judicial service was not a service in the sense of employment and was distinct from other services. Referring to various provisions of the impugned Act and the definitions of the terms "any office or department" in an "establishment" and State", the High Court concluded that the provisions of Section 4 of the said Act were not applicable to the judicial service and that no reservation in terms thereof could be made in the matter of appointment to the post of District Judges and other judicial officers subordinate to the District Judge. The High Court extensively referred to the observations of this Court in the case of All India Judges Association & Ors. vs. Union of India & Ors. [AIR 1993 SC 2493] to conclude that the judicial service having been assigned a special status and place in the Constitution was in contradistinction to other services within the constitutional framework. It was held that the definition of "office or department" and of "establishment" under the Act was referable to the office or department of the Court and not the Court itself. Part XIV Chapter I of the Constitution relates to "services under the Union and the State". Article 309 authorises the appropriate Legislature to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State, however, subject to other provisions of the Constitution. Proviso to Article 309 authorises the executive to make rules regulating the recruitment and conditions of service of persons appointed to such services or posts until powers in that behalf are exercised by the appropriate Legislature under Article 309 of the Constitution. "Public Service"

> means anything done for the service of the public in any part of the country in relation to the affairs of the Union or the State. It was opposite of private service. Persons connected with the discharge of public duties relating to any of the organs of the State i.e. executive, judiciary and legislature including the Armed Forces, would be termed as "public servants" engaged in the service of the Public. Public services and posts in connection with the affairs of the Union or of any State would refer to all services and posts under the Union and the State and include every commissioned officer in the Military, Naval or Air Force, every Judge, every officer of court of justice, a member of Panchayat, every arbitrator or other person to whom any cause

or matter has been referred for decision or report by any court of justice, every person who holds any office by virtue of which he is empowered to place or keep any person in confinement; every officer of the Government whose duty it is as such officer, to prevent offences, to give information of offences, to bring offenders to justice or to protect the public health, safety or convenience; every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey assessment or contract on behalf of the Government; every officer who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election; every person in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government; or such person in the pay of a local authority, a corporation established by or under a Central or State Act, and the like. Section 21 of the Indian Penal Code may be an indicator to refer to the public services and posts intended to be covered or contemplated under Article 309 of the Constitution. Judicial service, therefore, cannot be termed not to be a service within the meaning of Article 309. Accordingly, the appointment of District Judge under Article 233 is an appointment to the public service within the meaning of Article 309 of the Constitution. It is true that the constitutional scheme envisages an independent judiciary not being under the Executive but such an independent judiciary cannot be termed to be a creation of a distinct service in the State being not subject to law making sovereign powers of the Legislature. Article 309, as noticed earlier, is itself subject to other provisions of the Constitution which guarantee the independence of judiciary. The power of appointment of District Judges is vested in the Governor subject to the conditions imposed under Article 233 of the Constitution. It follows, therefore, that subject to the other provisions of the Constitution, the appropriate Legislature can regulate the recruitment and condition of service of all persons appointed to public services including the judicial services and posts in connection with the affairs of the Union or of the State. Similarly with restraint of the provisions of Article 309 the Governor of the State can make rules regulating the recruitment and condition of service of such persons. The scheme of the Constitution, ensuring independence of judiciary clearly and unambiguously provides that no power is conferred upon executive to exercise disciplinary authority and jurisdiction in respect of judicial service. Express provision has been made under the Constitution, vesting in the High Court "the control over District Courts and Courts subordinate thereto". Such a provision did not exist in the Government of India Act, 1935. In State of West Bengal & Anr. vs. Nripendra Nath Bagchi [AIR 1966 SC 447] this Court after referring to Articles 233, 234 and 235 of the Constitution held that the aforesaid Articles were intended to make special provision for the judicial service of the State. To understand why a special chapter was provided when there existed Part XIV dealing with the service under the Union and the State it was found necessary to go into the history of the aforesaid constitutional provision. It was held: "Before we set down briefly how this Chapter came to be enacted outside the Part dealing with Services and also why the articles were worded, as they are, we may set down the corresponding provisions of the

Government of India Act, 1935. There too a special provision was made in respect of judicial officers but it was included as a part of Chapter 2 of Part X which dealt with the Civil Services under the Crown in India. The cognate sections were Ss.254 to 256 and they may be reproduced here:

"254. District Judges, etc. (1) Appointments of persons to be, and the posting and promotion of District Judges in the Province shall be made by the Governor of 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.

(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.

(3) In this and the next succeeding section the expression District Judge includes Additional District Judge, Joint District Judge, Assistant District Judge, Chief Judge of a Small Cause Court, Chief Presidency Magistrate, Sessions Judge, Additional Sessions Judge, and Assistant Sessions Judge.

255. Subordinate Civil Judicial Service.

(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.

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) The Provincial Public Service Commission for each Province, after holding such examinations, if any, as the Governor may think necessary, shall from time to time out of the candidates for appointment to the subordinate civil judicial service of the Province make a list or lists of the persons whom they consider fit for appointment to that service, and appointment to that service shall be made by the Governor from the persons included in the list or lists in accordance with such regulations as may from time to time be made by him as to the number of persons in the said service who are to belong to the different communities in the Province.

(3) The posting and promotion of, and the grant of leave to, persons belonging to the subordinate civil judicial service of a Province and holding any post inferior to the post of District Judge, shall be in the hands of the High Court, but nothing in this section shall be construed as taking away from any such person the right of appeal required to be given to him by the foregoing provisions of this chapter, or as authorising the High Court to deal with any such person otherwise than in accordance

with the conditions of his service prescribed thereunder.

256 Subordinate criminal magistracy.

No recommendation shall be made for the grant of magisterial powers or of enhanced magisterial powers to, or the withdrawal of any magisterial powers from, any person save after consultation with the District Magistrate or the district in which he is working, or with the Chief Presidency Magistrate, as the case may be.

It may be pointed out at once that in the present Constitution these provisions have been lifted from the Chapter dealing with Services in India and placed separately after the provisions relating to the High Courts of the States.

(8) As far back as 1912 the Islingtons Commission stated that the witnesses before the Commission demanded two things (1) recruitment from the Bar to the superior judicial service, namely, the District judgeship; and (2) the separation of the judiciary from the executive. The Commission stated in the report: Opinion in India is much exercised on the question of the separation of the executive and the judicial functions of the officers'...and observed that to bring this about legislation would be required. The Commission made its report on August 14, 1915, a few days after the Government of India Act, 1915 (5 and 6 Geo. V. c.61) was enacted. The Act did not, therefore, contain any special provision about the judicial services in India. The World War I was also going on. In 1919, Part VII-A consisting of Ss.96-B to 96-E was added in the Government of India Act, 1915 S.96-B provided that every person in the Civil Service of the Crown in India held office during His Majestys pleasure but no person in that service might be dismissed by any authority subordinate to that by which he was appointed. The only section that concerns us in S.96-B. Sub-s.(2) of that section reads as follows:

> "(2) The Secretary of State in Council may make rules for regulating the classification of the civil services in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct.

Such rules may, to such extent and in respect of such matters as may be prescribed, delegate the power of making rules to the Governor-General in Council or to Local Governments, or authorise the Indian legislature or local legislatures to make laws regulating the public services:"

> The Fundamental Rules and the Civil Services (Classification, Control and Appeal) Rules were made by the Secretary of State in Council under the above rule- making power. These rules governed the judicial services except the High Court. Part IX of the Government of India Act dealt with the Indian High Courts, their constitution and jurisdiction. Section 107 gave to the High Courts superintendence over all Courts for the time being subject to its appellate jurisdiction and enumerated the things the High Court could do. They did not include the appointment, promotion, transfer or control of the District Judges. High Court could only exercise such control as came within their superintendence over the Courts subordinate to their appellate

jurisdiction. In the Devolution Rules, Item 17 in Part II dealing with the Provincial subjects read as follows:-

"Administration of justice, including constitution, powers, maintenance and organisation of civil Court and criminal jurisdiction within the Province; subject to legislation by the Indian legislature as regards High Courts, Chief Courts, and Court of Judicial Commissioners and any Courts of criminal jurisdiction."

It would thus appear that the problem about the independence of judicial officers, which was exercising the minds of the people did not receive full attention and to all intents and purposes the Executive Government and Legislatures controlled them. The recommendations of the Islington Commission remained a dead letter. When the Montague-Chemlsford enquiry took place the object was to find out how much share in the legislative and executive fields could be given to Indians. The post of the District Judge was previously reserved for Europeans. The disability regarding Indians was removed as a result of the Queens Proclamation in 1870 and rules were framed first in 1873. In 1875 Lord Northbrooks Government framed rules allowing Indians to be appointed and Lord Lyttons Government framed Rules fixing 1/5th quota for the Indians. There was no fixed principle on which Indians were appointed and the report of the Public Service Commission presided over by Sir Charles Aitchison in 1886 contains the system followed in different Provinces. This continued down to 1919. The Government of India Act had introduced Dyarchy in India and the question of control of services in the transferred field was closely examined when the Government of India Act, 1935 was enacted. It was apprehended that if transference of power enabled the Ministers to control the services, the flow of Europeans to the civil services would become low. Government appointed several committees, chief among them the MacDonnel Committee considered the position of the Europeans vis-.-vis the services. There was more concern about Europeans than about the independence of the judiciary.

(9) The Indian Statutory Commission did not deal with the subject of judicial services but the Joint Committee dealt with it in detail. It is interesting to know that the Secretary of State made a preliminary statement on the subject of subordinate civil judiciary and his suggestion was to leave to the Provincial Legislatures the general power but to introduce in the Constitution a provision which would in one respect override those powers, namely, power to select the individuals for appointment to the Civil Judicial Services, to lay down their qualifications, and to exercise over the members of the service the necessary administrative control.' He said that 'the powers of the local Government should be 'to fix the strength and pay of the services to which the High Court would recruit' and to lay down, if they so thought fit, any general requirement...'. During the debates Marquis of Salisbury asked a question with regard to the general powers of the High Courts and the control over the subordinate courts. It was:

"As I understood the Secretary of State in his statement, the control of the High Court the subordinate judges in civil matters has to be as complete as possible and maintained. Is that so?. The answer was, yes. (No.7937)".

(10) The recommendations of the Joint Committee also followed the same objective. In the report (paragraph 337 p.201) the following observations were made:

> "337. Necessity for securing independence of subordinate judiciary. The Federal and High Court Judges will be appointed by the Crown and their independence is secure; but appointments to the Subordinate Judiciary must necessarily be made by authorities in India who will also exercise a certain measure to control over the Judges after appointment, especially in the matter of promotion and posting. 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 hierarchy 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...".

As a result, when the Government of India Act, 1935 was passed it contained special provisions (Sections 254-256 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 Courts but the posting and promotion and grant of leave of persons belonging to the 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 S.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 S.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 to the District Judges was thus assured to a certain extent, but not quite.

(11) 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 Arts.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."

It was further held that Articles 233 and 235 made mention to two distinct powers. The first relates to power of appointment of persons, their posting and promotion and the second is the power to control. This Court did not accept the contention that the word "District Court" denoted only the court but not the Presiding Judge. The latter part of Article 235 has been held to refer to the man who holds the office. The Articles vest "control in the High Court". The purpose of the aforesaid Articles was held to be in regard with the Directive Principles in Article 50 of the Constitution which mandates the States to take steps to separate the judiciary from the executive in the public services of the State. Reference to Article 50 in connection with Articles 233, 234 and 235, clearly and unambiguously shows that this Court has held that the judicial service was a public service within the meaning of Article 309 regarding which law could be made, however, subject to other provisions of the Constitution providing and guaranteeing the independence of judiciary. In B.S. Yadav & Ors, etc.v. State of Haryana & Ors., etc. [1981 (1) SCR 1024] this Court considered the scope and extent of Articles 235 and 309 of the Constitution and held that the power to frame rules regarding the judicial officers vested in the Governor and not in the High Court. The first part of Article 235 vests the control over District Courts and courts subordinate thereto in the High Court and the second part of that Article mandates that nothing in the Articles shall be construed as taking away from any person belonging to the judicial service any right of appeal which he may have under law regulating the conditions of service or authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law. Outer limits of the High Court's powers of control over the subordinate judiciary have thus been defined providing that it is not open to the High Court to deny to a member of the subordinate judicial service of the State the right of appeal given to him by law which regulates the conditions of his service. Even the High Court, in exercise of its power of control, cannot deal with such person otherwise than in accordance with the conditions of his service which are prescribed by law. This court then put a question to itself as to who had the power to pass such a law and answered it: "Obviously not the High Court because, there is no power in the High Court to pass a law, though rules made by the High Court in the exercise of power conferred upon it in that behalf may have the force of law. There is a distinction between the power to pass a low and the power to make rules, which by law, have the force of law. Besides, law which the second part of Art.235 speaks of, is law made by the legislature because, if it were not so, there was no purpose in saying that the High Courts power of control will not be construed as taking away certain rights of certain persons under a law regulating their conditions of service. It could not have been possibly intended to be provided that the High Courts power of control will be subject to the conditions of service prescribed by it. The clear meaning, therefore, of the second part of Article 235 is that the power of control vested in the High Court by the first part will not deprive a judicial officer or the rights conferred upon him by a law made by the legislation regulating him conditions of service.

Article 235 does not confer upon the High Court the power to make rules relating to conditions of service of judicial officers attached to district courts and the courts subordinate thereto. Whenever, it was intended to confer on any authority the power to make any special provisions or rules, including rules relating to conditions of service, the Constitution has stated so in express terms. See,

for example Articles 15(4), 16(4), 77(3), 87(2), 118, 145(1), 146(1), and 2(148)(5), 166(3), 176(2), 187(3), 208, 225, 227(2) and (3), 229(1) and (2), 234, 237 and 283(1) and (2). Out of this fasciculus of Articles, the provisions contained in Articles 225, 227(2) and (3) and 229(1) and (2) bear relevance on the question, because these Articles confer power on the High Court to frame rules for certain specific purpose. Article 229(2) which is directly in point provides in express terms that subject to the provisions of any law made by the legislature of the State, the conditions of service of officers and servants of a High Court shall be such as may be prescribed by the rules made by the Chief Justice or by some other Judge or officer of the Court authorised by the Chief Justice to make rules for the purposes. With this particular provision before them, the framers of the Constitution would not have failed to incorporate a similar provision in Article 235 if it was intended that the High Courts shall have the power to make rules regulating the conditions of service of judicial officers attached to district courts and courts subordinate thereto.

Having seen that the Constitution does not confer upon the High Court the power to make rules regulating the conditions of service of judicial officers of the district courts and the courts subordinate thereto, we must proceed to consider: who, then, possesses that power? Article 309 furnishes the answer. It provides that Acts of the appropriate legislature may regulate the recruitment and conditions of service of persons appointed to posts in connection with the affairs of the Union or of any State. Article 248(3), read with Entry 41 in List II of the Seventh Schedule, confers upon the State legislatures the power to pass laws with respect to "State public services" which must include the judicial services of the State. The power to control vested in the High Court by Art.235 is thus expressly, by the terms of that Article itself, made subject to the law which the State legislature may pass for regulating the recruitment and service conditions of judicial officers of the State. The power to pass such a law was evidently not considered by the Constitution makers as an encroachment on the 'control jurisdiction' of the High Courts under the first part of Article 235. The control over the district courts and subordinate courts is vested in the High Court in order to safeguard the independence of judiciary. It is the High Court, not the executive, which possesses control over the State judiciary. But, what is important to bear in mind is that the Constitution which has taken the greatest care to preserve the independence of the judiciary did not regard the power of the State legislature to pass laws regulating the recruitment and conditions of service of judicial officers as an infringement of that independence. The mere power to pass such a law is not violative of the control vested in the High Court over the State Judiciary.

It is in this context that the proviso to Art.309 assumes relevance and importance. The State legislature has the power to pass laws regulating the recruitment and conditions of service of judicial officers of the State. But it was necessary to make a suitable provision enabling the exercise of that power until the passing of the law by the legislature on that subject. The Constitution furnishes by its provisions ample evidence that it abhors a vacuum. It has therefore made provisions to deal with situations which arise on account of the ultimate repository of a power not exercising that power. The proviso to Art.309 provides, in so far as material, that until the State Legislature passes a law on the particular subject, it shall be competent to the Governor of the State to make rules regulating the recruitment and the conditions of service of the judicial officers of the State. The Governor thus steps in when the legislature does not act. The power exercised by the Governor under the proviso is thus a power which the legislature is competent to exercise but has in fact not yet exercised. It

partakes of the characteristics of the legislative, not executive, power. It is legislative power.

That the Governor possesses legislative power under our Constitution is incontrovertible and, therefore, there is nothing unique about the Governors power under the proviso to Article 309 being in the nature of a legislative power. By Article 168, the Governor of a State is a part of the legislature of the State. And the most obvious exercise of legislative power by the Governor is the power given to him by Art.213 to promulgate ordinances when the legislature is not in session. Under that Article, he exercises a power of the same kind which the legislature normally exercises:

> the power to make laws. The heading of Chapter IV of Part VI of the Constitution, in which Art.213 occurs, is significant: "Legislative Power of the Governor". The power of the Governor under the proviso to Article 309 to make appropriate rules is of the same kind. It is legislative power. Under Article 213, he substitutes for the legislature because the legislature is in recess. Under the proviso to Article 309, he substitutes for the legislature because the legislature has not yet exercised its power to pass an appropriate law on the subject.
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> It is true that the power conferred by Article 309 is "subject to" the provisions of the Constitution. But it is fallacious for that reason to contend that the Governor cannot frame rules regulating the recruitment and conditions of service of the judicial officers of the State. In the first place, the power of control conferred upon High Courts by the first part of Article 235 is expressly made subject, by the second part of that Article, to laws regulating conditions of service of its judicial officers. The first part of Article 235 is, as it were, subject to a proviso which carves out an exception from the area covered by it. Secondly, the Governor, in terms equally express, is given the power by the proviso to Article 309 to frame rules on the subject. A combined reading of Articles 235 and 309 will yield the result that though the control over Subordinate Courts is vested in the High Court, the appropriate legislature, and until that legislature acts, the Governor of the State, has the power to make rules regulating the recruitment and the conditions of service of judicial officers of the State. The power of the legislature or of the Governor thus to legislate is subject to all other provisions of the Constitution like, for example, Articles 14 and 16. The question raised before us is primarily one of the location of the power, not of its extent. The second part of Article 235 recognises the legislative power to provide for recruitment and the conditions of service of the judicial officers of the State. The substantive provision of Article 309, including its proviso, fixes the location of the power. The opening words of Article 309 limit the amplitude of that power."
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> It was further declared that the mere power to pass a law or to make rules having the force of law regulating the service conditions did not impinge upon the control vested in the High Court over the district courts and the courts subordinate thereto by Article 235. Such laws or the rules, as the case may be, can provide for general or abstract rules (of seniority in that case) leaving it to the High Court to apply them to each individual case as and when the occasion arises. The opening words of Article

309, "subject to provisions of this Constitution" do not exclude the provision contained in the first part of Article 235. It is thus clear that though the legislature or the Governor has the power to regulate seniority of judicial officers by laying down rules of general application, yet that power cannot be exercised in a manner which will lead to interference with the control vested in the High Court by the first part of Article 235. In The High Court of Punjab & Haryana, etc. etc. vs. State of Haryana & Ors., etc. etc. [AIR 1975 SC 613] it was held that the power of appointment of persons to be District Judges is vested in the Governor of the State under Article 233. The words "posting and promotion of district judge" in Article 233 mean initial appointment by direct recruitment of persons to be district judges and the posting mentioned therein the initial posting. Promotion of district judges has been explained to mean promotion of persons to be district judges. In All India Judges Association case(supra) this Court no doubt held: "The judicial service is not service in the sense of 'employment'. The judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the council of ministers and the members of the legislature. When it is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the State, what is intended to be conveyed is that the three essential functions of the State are entrusted to the three organs of the State and each one of them in turn represents the authority of the State. However, those who exercise the State power are the ministers, the legislatures and the judges, and not the members of their staff who implement or assist in implementing their decisions. The council of ministers or the political executive is different from the secretarial staff or the administrative executive which carries out the decisions of the political executive. Similarly, the legislators are different from the legislative staff. So also the Judges from the judicial staff. The parity is between the political executive, the legislators and the Judges and not between the Judges and the administrative executive. In some democracies like the U.S.A., members of some State judiciaries are elected as much as the members of the legislature and the heads of the State. The Judges, at whatever level they may be, represent the State and its authority unlike the administrative executive or the members of the other services. The members of the other services, therefore, cannot be placed on par with the members of the judiciary, either constitutionally or functionally.

This distinction between the Judges and the members of the other services has to be constantly kept in mind for yet another important reason. Judicial independence cannot be secured by making mere solemn proclamations about it. It has to be secured both in substance and in practice. It is trite to say that those who are in want cannot be free. Self-reliance is the foundation of independence. The society has a stake in ensuring the independence of the judiciary, and no price is too heavy to secure it. To keep the judges in want of the essential accoutrements and thus to impede them in the proper discharge of their duties is to impair and whittle away justice itself."

But it has to be kept in mind that in the same judgment this Court considered the powers under Article 309 of the Constitution authorising the executive and the legislative to prescribe the service conditions of the judiciary, however, rejecting the contention that in that regard judiciary did not have any say in the matter. It was held: "In view of the separation of the powers under the Constitution, and the need to maintain the independence of the judiciary to protect and promote democracy and the rule of law, it would have been ideal if the most dominant power of the executive and the legislative over the judiciary, viz., that of determining its service conditions had been subjected to some desirable checks and balances. This is so even if ultimately, the service conditions of the judiciary have to be incorporated in and declared by the legislative enactments. But the mere fact that Art.309 gives power to the executive and the legislature to prescribe the service conditions of the judiciary does not mean that the judiciary should have no say in the matter. It would be against the spirit of the Constitution to deny any rule to the judiciary in that behalf, for theoretically it would not be impossible for the executive or the legislature to turn and twist the tail of the judiciary by using the said power. Such a consequence would be against one of the seminal mandates of the Constitution, namely, to maintain the independence of the judiciary."

It may be noticed that the All India Judges Association had filed Writ Petition (C) No.1022/89 in this Court praying therein: "1. Uniformirty in the Judicial cadres in the different States and Union Territories;

2. An appropriate enhanced uniform age of retirement for the Judicial Officers throughout the country;

3. Uniform pay scales as far as possible to be fixed;

4. Residential accommodation to be provided to every Judicial Officer.

5. Transport facility to be made available and conveyance allowance provided.

6. Adequate perks by way of Library Allowance, Residential Office Allowance, and Sumptuary Allowance to be provided.

7. Provision for inservice training to be made."

Upon consideration of various aspects including the reports of the Law Commission, this Court recommended and directed that: "(i) An all India Judicial Service should be set up and the Union of India should take appropriate steps in this regard.

(ii) Steps should be taken to bring about uniformity in designation of officers both in civil and criminal side by 31.3.1993.

(iii) Retirement age of judicial officers be raised to 60 years and appropriate steps are to be taken by 31.12.1992.

(iv) As and when the Pay Commissions/Committees are set up in the States and Union Territories, the question of appropriate pay scales of judicial officers be specifically referred and considered.

(v) A working library at the residence of every judicial officer has to be provided by 30.6.1992. Provision for sumptuary allowance as stated has to be made.

(vi) Residential accommodation to every judicial officer has to be provided and until State accommodation is available, Government should provide requisitioned accommodation for them in the manner indicated by 31.12.1992. In providing residential accommodation, availability of an office room should be kept in view.

(vii) Every District Judge and Chief Judicial Magistrate should have a State vehicle. Judicial officers in sets of 5 should have a pool vehicle and others would be entitled to suitable loans to acquire two wheeler automobiles within different time limits as specified.

(viii) Inservice Institute should be set up within one year at the Central and State or Union Territory level."

It may be remembered that the recommendations and directions were issued by the Court in a writ petition in which no objection was raised regarding the competence of the State to enact laws and make rules under Article 309 of the Constitution. In exercise of its powers under Article 32 of the Constitution this Court was clothed with the authority and powers vesting in it under Articles 141 and 142 of the Constitution. The judgment in All India Judges Association case decided that the issuance of directions by the Court did not have the effect of encroaching upon the powers of the executive and the legislature under Article 309 of the Constitution. The Court referred to the recommendations of the Law Commission made in the year 1958 and observed that the said recommendations had been made to improve the system of justice and thereby to improve the content and quality of justice administered by the Courts. It was noted that "instead of improving, they have deteriorated making it necessary to update and better them to meet the needs of the present times". It was specifically held: "By giving directions in question, this Court has only called upon the executive and the legislature to implement their imperative duties. The Court do issue directions to the authorities to perform their obligatory duties whenever there is a failure on their part to discharge them. The power to issue such mandates in proper cases belongs to the Courts. As has been pointed out in the judgment under review, this Court was impelled to issue the said directions firstly because the executive and the legislature had failed in their obligations in that behalf. Secondly, the judiciary in this country is a unified institution judicially though not administratively. Hence uniform designations and hierarchy, with uniform service conditions are unavoidable necessary consequences. The further directions given, therefore, should not be looked upon as an encroachment on the powers of the executive and the legislature to determine the service conditions of the judiciary. They are directions to perform the long overdue obligatory duties.

The contention that the directions of this Court supplant and bypass the constitutionally permissible modes for change in the law, we think, wears thin if the true nature and character of the directions are realised. The directions are essentially for the evolvement of an appropriate national policy by the Government in regard to the judiciarys condition. The directions issued are mere aids and incidental to and supplemental of the main direction and as a transitional measure till a comprehensive national policy is evolved. These directions, to the extent they go, are both reasonable and necessary."

In Hari Datt Dainthla & Anr. vs. State of Himachal Pradesh & Ors. [AIR 1980 SC 1426] this Court held:

> "Article 233 confers power on the Governor of the State to appoint persons either by direct recruitment or by promotion from amongst those in the judicial service as District Judges but this power is hedged in with the condition that it can be exercised by the Governor in consultation with the High Court. In order to make this consultation meaningful and purposive the Governor has to consult High Court in respect of appointment of each person as District Judge which includes an Additional District Judge and the opinion expressed by the High Court must be given full weight. Article 235 invests control over subordinate courts including the officers manning subordinate courts as well as the ministerial staff attached to such courts in the High Court. Therefore, when promotion is to be given to the post of District Judge from amongst those belonging to subordinate judicial service, the High Court unquestionably will be competent to decide whether a person is fit for promotion and consistent with its decision to recommend or not to recommend such person. The Governor who would be acting on the advice of the Minister would hardly be in a position to have intimate knowledge about the quality and qualification of such person for promotion. Similarly when a person is to be directly recruited as a District Judge from the Bar the reasons for attaching full weight to the opinion of the High Court for its recommendation in case of subordinate judicial service would mutatis mutandis apply because the performance of a member of the Bar is better known to the High Court than the Minister or the Governor. In Chandra Mohan v. State of Uttar Pradesh (1967) 1 SCR 77 at p.83 (AIR 1966 SC 1987), a Constitution Bench of this Court observed as under:
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> "The constitutional mandate is clear. The exercise of the power of appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of District Judge in consultation with the High Court. The object of consultation is apparent. The High Court is expected to know better than the Governor in regard to the suitability or otherwise of a person, belonging either to the 'judicial service' or to the Bar, to be appointed as a District Judge. Therefore, a duty is enjoined on the Governor to make the appointment in consultation with a body which is the appropriate authority to give advice to him."

This view was reaffirmed in Chandramouleshwar Prasad v. Patna High Court (1970) 2 SCR 666: (AIR 1970 SC 270), observing:

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

It was further held that in the absence of statutory rules regulating the promotions from one post in subordinate judicial service to higher post in the same service, the High Court would be the sole authority to decide the question in exercise of its control under Article 235 which empowers the High Court with complete control over the subordinate courts. The existence of this control comprehends the power to decide eligibility for promotion from one post in the subordinate judicial service to higher post in the same service except where one reaches the stage of giving promotion when Article 233 would be attracted and the power to give promotion would be in Governor hedged in with the condition that the Governor can act after consultation with the High Court which has been understood to mean on the recommendation of the High Court. If the High Court felt that the post of District Judge being a very responsible post should be filled up by promotion only on merits, it is incumbent upon it to propose necessary rules and get them enacted under Article 309. In Chandra Mohan vs. State of Uttar Pradesh & Ors. [1967 (1) SCR 77] this Court held that the Constitution contemplates an independent judiciary in the States and in order to place the independence of the subordinate judiciary beyond question, provides, in Article 50 of the Directive Principles for the separation of the judiciary from the executive and secures such independence by enacting Articles 233 to 237 in Chapter VI of the Constitution. Under these Articles the appointment of the District Judges in any State are to be made by the Governor of the State, from the two sources, namely, : (i) service of the Union or of the State and (ii) members of the Bar. The words "service of the Union or of the State" do not mean any other service of the Union or the State except the judicial service as defined in Article 236(b) of the Constitution. This Court specifically held:

> "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. There are two sources of recruitment, namely, (i) service of the Union or of the State, and (ii) members of the Bar. The said judges from the first source are appointed in consultation with the High Court and those from the second source are appointed on the recommendation of the High Court. But in the case of appointments of persons to the judicial service other than as district judges, they will be made by the Governor of the State in accordance with rules framed by him in consultation with the High Court and the Public Service Commission. But the High Court has control over all the district courts and courts subordinate thereto, subject to certain prescribed limitations.
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> So far there is no dispute. But the real conflict rests on the question whether the Governor can appoint as district judges persons from services other than the judicial service; that is to say, can he appoint a person who is in the police, excise, revenue or such other service as a district judge? The acceptance of this position would take us back to the pre-independence days and that too to the conditions prevailing in the

Princely States. In the Princely States one used to come across appointments to the judicial service from police and other departments. This would also cut across the well-knit scheme of the Constitution and the principle underlying it, namely, the judiciary shall be an independent service. Doubtless, if Art.233(1) stood alone, it may be argued that the Governor may appoint any person as a district judge, whether legally qualified or not, if he belongs to any service under the State. But Art.233(1) is nothing more than a declaration of the general power of the Governor in the matter of appointment of district judges. It does not lay down the qualifications of the candidates to be appointed or denote the sources from which the recruitment has to be made. But the sources of recruitment are indicated in cl.(2) thereof. Under cl.(2) of Art.233 two sources are given, namely, (i) persons in the service of the Union or of the State, and

(ii) advocate or pleader. Can it be said that in the context of Ch.VI of Part VI of the Constitution, 'the service of the Union or of the State' means any service of the Union or of the State or does it mean the judicial service of the Union or of the State? The setting, viz., the chapter dealing with subordinate courts, in which the expression the service appears indicates that the service mentioned therein is the service pertaining to courts. That apart, Art.236(b) defines the expression judicial service to mean a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge. If this definition, instead of appearing in Art.236, is placed as a clause before Art.233(2), there cannot be any dispute that 'the service' in Art.233(2) can only mean the judicial service. The circumstances that the definition of 'judicial service' finds a place in a subsequent Article does not necessarily lead to a contrary conclusion. The fact that in Art.233(2) the expression 'the service' is used whereas in Art.234 and 235 the expression 'judicial service' is found is not decisive of the question whether the expression 'the service' in Art.233(2) must be something other than the judicial service, for, the entire chapter is dealing with the judicial service. The definition is exhaustive of the service. Two expressions in the definition bring out the idea that the judicial service consists of hierarchy of judicial officers starting from the lowest and ending with district judges. The expressions 'exclusively' and 'intended' emphasise the fact that the judicial service consists only of persons intended to fill up the posts of district judges and other civil judicial posts and that is the exclusive service of judicial officers. Having defined 'judicial service' in exclusive terms, having provided for appointments to that service and having entrusted the control of the said service to the care of the High Court, the makers of the world Constitution not have conferred a blanket power on the Governor to appoint any person from any service as a district judge.

Reliance is placed upon the decision of this court in Rameshwar Dayal v. State of Punjab (1961) 2 SCR 874 in support of the contention that the service in Art.233(2) means any service under the State. The question in that case was, whether a person whose name was on the roll of advocates of the East Punjab High Court could be appointed as a district judge. In the course of the judgment

S.K. Das, J., speaking for the Court, observed:

> "Article 233 is a self contained provision regarding the appointment of District Judges. As to a person who is already in the service of the Union or of the State, no special qualifications are laid down and under cl.(1) the Governor can appoint such a person as a district judge in consultation with the relevant High Court. As to a person not already in service, a qualification is laid down in cl.(2) and all that is required is that he should be an advocate or pleader of seven years standing."

This passage is nothing more than a summary of the relevant provisions. The question whether the service in Art.233(2) is any service of the Union or of the State did not arise for consideration in that case nor did the Court express any opinion thereon.

We, therefore, construe the expression the service in cl.(2) of Art.233 as the judicial service."

There is no dispute that the power under Article 309 conferred upon the legislature and the executive is subject to the opening words of the Article. The legislature and the executive cannot enact any law or make any rule which is in violation of any other provision of the Constitution. If any law or rule is made contravening any other provision of the Constitution including Articles 14, 15, 16, 19, 124, 217, 233, 234, and 235, such law or rule shall be void. This Article, however, does not debar the legislature or the executive to make provision with respect to the matters which are not in the covered field of other provisions of the Constitution. Various provisions of the Constitution including Part III Chapter VI, Part XIV Chapter I and Part XI Chapter I read with Seventh Schedule are to be read conjointly and interpreted harmoniously to make the various organs of the State function in their respective fields subject to limitations imposed by the Constitution itself including the power of the courts of judicial review. It cannot, therefore, be accepted that the judicial service is such an independent service which deprives the State Legislature and the executive to enact laws and make rules with respect to matters mentioned in Article 309 but not covered under Articles 233 to 236 of the Constitution. The provisions of Part III Chapter VI and Part XIV Chapter I have to be understood as complementary and supplementary to each other. Exercise of power under Article 309 is further curtailed by the constitutional mandate that no law be enacted and rule made which in any way affects the working of independent judiciary in the country. Such principles shall, however, be not applicable in the case of higher judiciary constituted and established under Part V Chapter IV and Part VI Chapter V. The Supreme Court of India and the High Courts in the country are the creation of the Constitution and the judges presiding over such courts, constitutional functionaries. The higher judiciary, therefore, cannot be equated with the "public services"

> contemplated under Part XIV Chapter I of the Constitution. The conditions of eligibility for appointment to the Supreme Court are such conditions as are prescribed under Article 124 of the Constitution and for the High Court as prescribed under Article 217 of the Constitution. These conditions, if allowed to be amended, modified or substituted by way of legislation in terms of Article 309 of the Constitution, would render the Union and the State judiciary defunct which, may amount to clipping its wings resulting in the destruction of independence of the

> higher judiciary as contemplated by the Constitution framers. The conditions for appointment of judges to the Supreme Court and the High Courts may not be amendable even by a constitutional amendment as the same is likely to tamper with the Indian judiciary and thereby adversely affect the basic features of the Constitution. The Constitution envisages a single judiciary, uniformity in Fundamental laws, civil and criminal, and a common All India Service to man important posts. Speaking on the nature of the constitutional scheme Dr.Ambedkar in his speech delivered on November 4, 1948 in the Constituent Assembly had said: "A dual judiciary, a duality of legal codes and a duality of civil services, as I said, are the logical consequences of a dual polity which is inherent in a federation. In the USA, the Federal Judiciary and the State Judiciary are separate and independent of each other. The Indian Federation though a Dual Policy has no Dual Judiciary at all. The High Courts and the Supreme Court form one single integrated Judiciary having jurisdiction and providing remedies in all cases arising under the constitutional law, the civil law or the criminal law. (Constitutent Assembly Debates. Vol.7 (1948-49) at pp.34,36-37)."

This Court in S.P. Gupta's case (Supra) held that:

> "An analysis of the various provisions of the Constitution and other laws having a bearing on the question shows that every High Court in India is an integral part of a single Indian judiciary and judges who hold the posts of judges of High Courts belong to a single family even though there may be a slight variation in two of the authorities who are required to be consulted at the time of the appointment. The provisions dealing with the High Courts are found in Chapter V in Part VI of the Constitution containing provisions governing the States and the salaries of the judges of a High Court are paid out of the funds of the State or States over which it exercises jurisdiction. Yet it is difficult to say that each High Court is independent of the other High Courts. A perusal of the other provisions in that Chapter shows that the State Legislatures and the State Governments have very little to do so far as the organisation of the High Courts is concerned."

Judges of the High Court do not constitute a single All India Cadre or a 'judicial service' which could be subjected to the Legislature in terms of Article 309 of the Constitution. While dealing with the High Court Judges Transfer case, Bhagwati, J. (as His Lordship then was) held that: "....the judiciary should be in a country like India which is marching along the road to social justice with the banner of democracy and the rule of law, for the principle of independence of the judiciary is not an abstract conception but it is a living faith which must derive its inspiration from the constitutional charter and its nourishment and sustenance from the constitutional values. It is necessary for every Judge to remember constantly and continually that our Constitution is not a non-aligned rational charter. It is a document of social revolution which casts an obligation on every instrumentality including the judiciary, which is a separate but equal branch of the State, to transform the status quo ante into a new human order in which justice, social, economic and political will inform all institutions of national life and there will be equality of status and opportunity for all. The judiciary has, therefore,

a socio- economic destination and a creative function. It has to use the words of Glanville Austin, to become an arm of the socio-economic revolution and perform an active role calculated to bring social justice within the reach of the common man. It cannot remain content to act merely as an umpire but it must be functionally involved in the goal of socio-economic justice". In these appeals, even the learned counsel appearing on behalf of the appellants has not tried to compare or equate the subordinate judiciary with the distinct and independent higher judiciary comprising of the judges of Supreme Court and the High Courts. The apprehension expressed on behalf of the respondents that if allowed to enact laws like the impugned Bihar Act, the Union Legislature may by law or amendment of the Constitution provide reservations in the higher judiciary with the object of controlling it and thereby demolishing the independence of judicary, is thus apparently misconceived besides being far-fetched. In the present appeals, it is conceded before us by all the parties concerned that appointments to the posts of District Judges are governed by the Bihar Superior Judicial Service Rules, 1951 (hereinafter referred to as "1951 Rules") which have, admittedly, been made by the Governor of Bihar in exercise of powers conferred upon him by the proviso to Article 309 read with Article 233 of the Constitution. Reference to Article 233 of the Constitution only indicates that before making the rules the High Court had been consulted. Article 233 of the Constitution itself does not envisage the making of rules either by the Governor or by the High Court. Rule 5 of the 1951 Rules provides that appointment to the Bihar Superior Judicial Service shall, in the first instance, ordinarily be to the post of Additional District & Sessions Judge and shall be made by the Governor in consultation with the High Court: "(a) by direct recruitment from among persons qualified and recommended by the High Court for appointment under clause (2) of Article 233 of the Constitution; or

(b) by promotion, from among members of the Bihar Judicial Service."

Of the Posts in the cadre of the service, 2/3rd are to be filled by promotion and 1/3rd by direct recruitment. The State Government may, in consultation with the High Court, deviate from the said proportion in either direction. Rule 3 read with Schedule provides the sanctioned strength of the service whereas other provisions relate to promotion, pay, allowances and seniority. There is no dispute that these rules have been and are being acted upon till date i.e. for about half a century. The High Court was, therefore, not justified in holding that the law made under Article 309 would not apply to the judicial service. If the rules made by the executive under Article 309 have been applied and acted upon, no objection could be taken to the sovereign powers of the legislature to enact and make laws with respect to the judicial service in exercise of its power under first part of Article 309 of the Constitution. It is also admitted that for appointments to the posts in the judicial service other than the District Judges, the State Governor, in exercise of his powers conferred upon him under Article 234 of the Constitution, after consultation with the High Court of Judicature at Patna and the Bihar Public Service Commission has made the rules called as "Bihar Judicial Service (Recruitment) Rules, 1955" (hereinafter referred to as "1955 Rules"). Rule 2 of the said Rules provides that the recruitment to the post of munsiff shall be made in accordance with the rules and recruitment to the post of subordinate judge shall be made by the High Court by promotion of munsiffs confirmed under Rule 24 and appointed under Rule 26. Rule 3 authorises the Governor to decide in each year the number of vacancies in the post of munsiff to be filled by appointments to be made on a substantive basis or on a temporary basis or both. The Bihar Public Service Commission is obliged

to announce in each year in such manner as they think fit the number of vacancies to be filled in that year by direct recruitment on the basis of a competitive examination for which applications are required to be invited from candidates eligible for appointments under the rules. The Commission has the power to fix the limit in any particular year as to the eligibility of the candidates to be admitted to the written examination and if the number of candidates exceeds to the limit fixed, the Commission may make a preliminary selection of candidates to be admitted to the written examination, on the basis of their academic records. No candidate of the Scheduled Castes or the Scheduled Tribes who is otherwise eligible under the Rules can be excluded from appearing at the written examination. Rules 6 provides: "6. A candidate may be of either sex, and must - (a) be under 31 years and over 22 years of age on the 1st day of August preceding the year in which the examination is held:

> Provided that a candidate belonging to a Scheduled Caste or a Scheduled Tribe must be under 36 years and over 22 years of age on the said date:
>
> Provided further that no candidate who does not belong to a Scheduled Caste or a Scheduled Tribe shall be allowed to take more than five chances at the examination;
>
> (b) be a graduate in Law of a University recognised by the Governor or a Barrister-at-Law or a member of the faculty of advocates in Scotland, or an Attorney on the rolls of a High Court, or possess other educational qualifications which the Governor may, after consultation with the High Court and the Commissions, decide to be equivalent to those prescribed above; and
>
> (c) be a practitioner at the Bar of at least one years continuous standing on the date of the advertisement."

Rule 6A provides that no person who has more than one wife living shall be eligible for appointment to the service. Rule 7 provides that a candidate must be of sound health, good physique and active habits and free from any physical defect likely to interfere with the efficient performance of the duties of a member of the Service. With his application a candidate is required to submit the required documents as detailed in Rule 9. The examination is to be held according to syllabus specified in Appendix C to the Rules which are liable to alteration from time to time by the Government after consultation with the High Court and the Commission. The Commission has the discretion to fix the qualifying marks in any or all subjects at the written examination in consultation with the Patna High Court. The minimum qualifying marks for candidates belonging to Scheduled Castes and Scheduled Tribes shall not be higher than 35 per cent unless the number of such persons at the written examination according to the standards applied for other candidates is considerably in excess of the number of candidates required to fill the vacancies reserved for the Scheduled Casts and the Scheduled Tribes. the Commission is obliged to consult the Chief Justice of the High Court in the matter of selection of examiners for the Law papers prescribed for the written examination. Viva-voce test of the candidates is to be held under Rule

17. The Chief Justice is authorised to appoint an officer to represent the High Court at the viva-voce test. Rule 20 provides that Commission shall, while submitting the recommendations, consider the claims of qualified candidates belonging to the Scheduled Castes and the Scheduled Tribes. If the list of nominees submitted under Rule 19 does not contain an adequate number of candidates belonging to the Scheduled Castes and the Scheduled Tribes, the Commission shall submit a supplementary list nominating a sufficient number of such candidates as in their opinion attain the required standard of qualifications and are in all respect suitable for appointment to the service. It has been conceded before us that to give effect to Rule 20 of the Rules, the Commission and the High Court have been acting upon the Government orders issued from time to time making reservations to the extent of 24% in favour of the Scheduled Castes and the Scheduled Tribes. It is undisputed that the 1955 Rules were made strictly in accordance with the requirement of Article 234 of the Constitution after proper consultation with the High Court and the Public Service Commission. It appears that the controversy arose only when the State Government insisted to make reservations in the Superior Judicial Service which was vehemently resisted by the High Court. The facts disclosed in the appeal entitled State of Bihar vs. Deepak Singh & Ors. indicate that on 30.1.1991 the State Government consented the High Court and Bihar Public Service Commission regarding making reservations in the judicial service. The Public Service Commission vide its letter No. 112 dated 30.1.1991 communicated its consent regarding the proposed amendment in the Bihar Judicial Service (Recruitment) Rules, 1955. However, the High Court vide Memo No.5999 dated 16.4.1991 informed the Government that "the court, in the interests of judiciary, is unable to agree to the proposal of the State Government". The aforesaid letters exchanged between the State Government, High Court and Public Service Commission obviously indicate that the State Government had intended to amend the rules already framed in exercise of the powers vesting in the Governor under Article 234 of the Constitution. In view of the resistance of the High Court, being one of the consultees in terms of Article 234, the State of Bihar opted to promulgate an Ordinance called "The Bihar Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes and Other Backward Classes) Ordinance,1991" under Article 213 of the Constitution. The aforesaid Ordinance was thereafter substituted by the Bihar Act No.3 of 1992 which was enforced with immediate effect except Section 4 which was declared to have come into force with effect from 1st November, 1994. The Reservation Ordinance was challenged in C.W.J.C. No.7619/91. The validity of letter dated 1.10.1990 whereby directions were issued to the effect that the vacancies of 24th Judicial Competitive Examination shall be filled in accordance with the said Ordinance were also challenged. During the pendency of the aforesaid writ petition, the Ordinance was replaced by an Act No.3 of 1992. The High Court allowed the writ petition vide the order impugned in this appeal holding that the impugned Ordinance/Act as also the letter dated 1.10.1990. In so far as its applicability to the State is concerned, it was ultra vires and contrary to the mandate of Article 234 of the Constitution. Similarly the facts revealed in Civil Appeal No.9072/96 indicate that when on 13.10.1993 the State Government decided to fill up the vacancies of Additional District Judges through fresh advertisement as per directions, the State Government on 16.11.1993 requested the High Court to send the vacancies categorywise in accordance with the provisions of Act of 1991. On 16.12.1993 the High Court informed the State Government that fresh advertisement be issued under Rule 5(a) and 6 of the 1951 Rules. It was further recommended that for eligibility the minimum age of the applicants be 35 years and maximum 50 year. The Government was further informed by the High Court that the 1991 Act will neither be applicable nor followed in the matter of direct recruitment

from the Bar. No preference be given to any person on the basis of caste, religion and sex. On 4.1.1994 the High Court was informed by the Government that the provisions of the Act of 1991 will also be applicable to the appointments in the Superior Judicial Service in the State of Bihar. The High Court was requested to send the vacancies reservation- wise. On 25.2.1994, the High Level Meeting under the Chairmanship of the Chief Secretary to the Government of Bihar was held in which the Secretary (Law) and Registrar of the High Court also participated. In this meeting a request was made to the High Court to send upto date vacancies in accordance with the Reservation Act as the non compliance was apprehended to lead to an offence under the Act. The High Court on 5th April, 1994 reiterated its position and vide it letter addressed to the Additional Secretary to the Government of Bihar intimated: "With reference to your above mentioned letter on the subject noted above, I am directed to say that the State Government has already been informed about the resolution adopted by the Court that in the matter of appointment of Additional District and Sessions Judge direct from the Bar, merit would be the sole criteria and no preference will be given to any candidate on the basis of caste, religion or sex. The resolution adopted by the Court does further state that without accepting the provision of the Bihar Reservation of Vacancy in Posts and Services (for Scheduled Castes/Scheduled Tribes and other Backward Classes) Act, 1991, the Court are always prepared to give preference to a candidate belonging to the Scheduled Caste or Scheduled Tribe, provided that he is found to be of equal merit with other candidates.

It needs to be appreciated that the post of Additional District and Sessions Judge, in the Superior Judicial Service, carries with it a greater responsibility in the matter of administration of justice. The post demands that the holder of the post should be a person of appreciable merit and requisite calibre to perform the functions of a Senior Judicial Officer."

On 1.9.1994, the High Court again intimated to the State Government of its position. It is to be noticed that before this date the State Government had issued advertisement on 16.6.1994 inviting applications for recruitment of Additional District and Sessions Judge from the Bar reserving post for the Scheduled Castes and Scheduled Tribes, backward classes, etc. to the extent of the limits prescribed under the Reservation Act. Aggrieved by the advertisement/notification respondents Advocates filed the writ petition seeking a declaration that the provisions of the Reservation Act were void and inoperative insofar as they relate to the Bihar Superior Judicial Service. The aforesaid writ petition was disposed of vide the judgment impugned in this appeal. It is thus evident that having failed to get the consent of the High Court in framing the Rules either under Article 234 or Article 309 read with Article 233 of the Constitution, resort was had to the issuance of Ordinance and thereafter enacting the impugned Act. This unfortunate position arose on account of the antagonistic and belligerent approaches adopted by the State Government and the High Court. Had the aforesaid two wings of the State acted fairly realising their obligations under the Constitution, the confrontation could have been avoided. Such a recourse was depricated by this Court in B.S. Yadavs case (supra) observing "this unfortunate position has arisen largely because of the failure of the State Governments to take the High Court into confidence while amending the Rules of Service. We must express our concern at the manner in which the Rules of the Superior Judicial Service have been amended by the Governor of Punjab and particularly by the Governor of Haryana". In that case the Rules had been amended despite the opposition of the High Court and amendment in Haryana was made in order to spite a single judicial officer who was a direct recruit. Both the State

Government and the Patna High Court failed to realise their constitutional obligations in the matter of public service. The insistence of the State Government could have been substituted by persuations and antagonism by the High Court could have been avoided by adopting rational approach realising the responsibility of the State of the constitutional obligations mandating them to make reservations in favour of the weaker sections of the society. It cannot be denied that the Reservation Policy has been accepted to be a part of the Indian Parliamentary Democracy as a safeguarding measure to protect the interests of the Scheduled Castes and Scheduled Tribes. Reservations have been made in the Constitution to safeguard the interests of Scheduled Castes and Scheduled Tribes keeping in mind the proportions of their population. It cannot be denied that such weaker sections of the society have been subjected to decades of exploitation, persecution and discrimination by the hostile dominating classes, having been kept outside the sphere of the mainstream for centuries and deprived of their due share in the polity of the State. They were acknowledged to be given a special treatment under the Constitution. The reservation on the basis of the caste has a long history in our country. Good or bad the reservation being the part of the Constitution, the High Court should not have adopted an adamant attitude of totally refusing to concede to the request of the State Government for making reservations for the weaker sections of the society. The hostility between two wings of the State have not, in any way, strengthened the democratic set up nor has it benefitted any section of the Society or institution. It is to be noticed that the reservations made by the impugned Act were not challenged on the ground of being either violative of Fundamental Rights or contrary to the other provisions of the Constitution, except to the extent noticed hereinabove. Relying upon judgment in K.N. Chandra Sekhara & Ors.v. State of Mysore (AIR 1963 Mysore 292) and M.I. Nadaf vs. The State of Mysore (AIR 1967 Mysore 77) the High Court vide the order impugned in Deepak Kumars case held:

> "Article 234 directs the appointment of persons to certain cadres of the judicial service of the State only in accordance with the Rules made under that Article and which appoints the Governor of the State, the authority to make these rules after consultation with the High Court and the Public Service Commission. It is manifest from Article 234 of the Constitution that the constitutional intent was that appointments to the judicial services in a State, unlike other State services, should be regulated only by rules made under that Article and not by a law made by the Legislature of the State, which was conferred power by Article 309 to make laws for recruitment to other services. The judicial service was selected for special treatment and appointments to it were excepted out of the operation of Article 309, and out of the orbit of ordinary Legislative Control. Article 234 incorporates a command of the Constitution on the subject of appointments to the cadres of the judicial service referred to in it and constitutes the Governor in a sense a select Legislative organ for the enactment of rules for the accomplishment of the Constitutional purpose. The status of the rules so enacted is as high as that of a law made by the Legislature under Article 309 and of the rules made under the proviso to it. The attributes of a Governor to enact rules under Article 234 therefore resemble those of a Legislature enacting legislation in its own legislative field. The similitude between the power of the Legislature and the power of the Governor being so obvious, it is clear that the bounds of permissible delegation in each case should also be similar."

It cannot be disputed that the judicial service has been given a special treatment under the Constitution and the appointments to the judicial service can be made only in accordance with the rules made by the Governor under Article 234 after consultation with the State Public Service Commission and the High Court exercising jurisdiction in relation to such State. It follows, therefore, that the Governor or the executive have no right, power or authority to make rules with respect to the recruitment of persons other than the District Judges to the judicial service of the State under Article 309 of the Constitution. Rules governing the service conditions of such persons in the judicial service can be made by the Governor only in the manner as prescribed under Article 234 of the Constitution. It is, however, difficult to accept the finding of the High Court that the status of the Rules enacted under Article 234 of the Constitution is as high as that of law made by the legislature under Article 309. It cannot be accepted that the attributes of a Governor to enact Rules under Article 234 resemble those of a legislature enacting legislation in its own legislative field and have overriding effect. The power of the legislature to make law regulating the recruitment and conditions of service for persons appointed to public services and posts in connection with the affairs of Union or of any State under Article 309 of the Constitution is only subject to the other provisions of Constitution which have been noticed hereinbefore. Rules made under the delegated legislation cannot be termed to be such other provisions of the Constitution. It is not only Article 234 which confers power upon the Governor to make Rules in the manner prescribed but various other provisions including Article 309 which authorise him to make rules for the purposes envisaged and the restrictions and restraints imposed by the Constitution itself. It is settled position of law that the Legislature cannot part with its essential legislative function. A surrender of such essential function would amount to abdication of legislative powers in the eyes of law. No rule or law made by virtue of delegated legislation can supersede or override the powers exercised or the law made by the delegator of power, the sovereign legislative, in exercise of its constitutional right with respect to a matter or subject over which it has otherwise plenary power of legislation. In Re: Article 143, Constitution of India and Delhi Laws Act (1912) etc. [AIR 1951 SC 332], Kania, CJ, after dealing with various cases of foreign courts found that the Indian Legislature had plenary powers to legislate on the subjects falling within its powers under the Constitution. He further observed, "every power given to a delegate can be normally called back. There can hardly be a case where this cannot be done because the legislative body which confers powers on the delegate has always the power to revoke that authority and it appears difficult to visualise a situation in which such power can be irrevocably lost". Referring to the constitutional scheme in this country, Kania, CJ held: "Under the new Constitution of 1950, the British Parliament, i.e. an outside authority, has no more control over the Indian Legislature. That Legislatures powers are defined and controlled and the limitations thereon prescribed only by the Constitution of India. But the scope of its legislative power has not become enlarged by the provisions found in the Constitution of India. While the Constitution creates the Parliament and although it does not in terms expressly vest the legislative powers in the Parliament exclusively, the whole scheme of the Constitution is based on the concept that the legislative functions of the Union will be discharged by the Parliament and by no other body. The essential of the legislative functions, viz., the determination of the legislative policy and its formulation as a rule of conduct, are still in the Parliament or the State Legislature, as the case may be and nowhere else. I take that view because of the provisions of Article 357 and Article 22(4) of the Constitution of India. Article 356 provides against the contingency of the failure of the constitutional machinery in the States. On a proclamation to that effect being issued, it is provided in Article

357(a) that the power of the legislature of the State shall be exercisable by or under the authority of the Parliament, and it shall be competent for the Parliament to confer on the President the power of the legislature of the State to make laws "and to authorise the President to delegate, subject to such conditions as he may think fit to impose, the powers so conferred to any other authority to be specified by him in that behalf." Sub-clause (2) runs as follows:

> "For Parliament or for the President or other authority in whom such authority to make law conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities thereof."

It was contended that on the breakdown of such machinery authority had to be given to the Parliament or the President, firstly, to make laws in respect of subjects on which the State Legislature alone could otherwise make laws and, secondly, to empower the Parliament or the President to make the executive officers of the State Government to act in accordance with the laws which the Parliament or the President may pass in such emergency. It was argued that for this purpose the word 'to delegate' is used. I do not think this argument is sound. Sub-clause (2) relates to the power of the President to use the State executive offices. But under clause (a) Parliament is given power to confer on the President the power of the 'legislature' of the State 'to make laws'. Article 357(1)(a) thus expressly gives power to the Parliament to authorise the President 'to delegate his legislative powers'. If powers of legislation include the power of delegation to any authority there was no occasion to make this additional provisions in the Article at all. The wording of this clause therefore supports the contention that normally a power of legislation does not include the power of delegation."

Fazal Ali, J. on the point relating to the functions of the Legislature and its authority to delegate held: "The legislature must normally discharge its primary legislative function itself and not through others (2) Once it is established that it has sovereign powers within a certain sphere, it must follow as a corollary that it is free to legislate within that sphere in any way which appears to it to be the best way to give effect to its intention and policy in making a particular law, and that it may utilize any outside agency to any extent it finds necessary for doing things which it is unable to do itself or finds it inconvenient to do. In other words, it can do everything which is ancillary to and necessary for the full and effective exercise of its power of legislation. (3) It cannot abdicate its legislative functions, and therefore, while entrusting power to an outside agency, it must see that such agency acts as a subordinate authority and does not become a parallel legislature. (4) The doctrine of separation of powers and the judicial interpretation it has received in America ever since the American Constitution was framed, enables the American courts to check undue and excessive delegation but the Courts of this country are not committed to that doctrine and cannot apply it in the same way as it has been applied in America. Therefore, there are only two main checks in this country on the power of the legislature to delegate, these being its good sense and the principle that it should not cross the line beyond which delegation amounts to abdication and self-effacement'."

Mahajan, J. was of the view that the Parliament being omnipotent despot, apart from being a legislature simpliciter, it can, in exercise of its sovereign power delegate its legislative functions or

even create new bodies conferring on them power to make laws. Whether it exercises its power of delegation of legislative power in its capacity as a mere legislature or in its capacity as omnipotent despot, its actions were not subject to judicial scrutiny. In the same case Mukherjea, J. held that the legislature cannot part with its essential legislative function. A surrender of this essential function would amount to abdication of its power in the eyes of law. In Hotel Balaji & Ors., etc. etc. vs. State of Andhra Pradesh & Ors., etc. etc. [AIR 1993 SC 1048] this Court held that legislative competence of a legislature to enact a particular provision in the Act cannot be made to depend upon the rule or rules, as the case may be, at a given point of time. Conferment of power upon the Governor to make rules in the manner prescribed under Article 234 of the Constitution cannot be interpreted to mean that the constitutional makers had intended to take away the power of the legislature, admittedly, conferred upon it under Part XI Chapter I read with Seventh Schedule of the Constitution. Such an interpretation, if accepted, would be contrary to the settled principles relating to interpretation of Statutes. Whereas it is true that the Governor of a State cannot make rules with respect to subjects covered by Article 234 in any other manner, (Article 309) it cannot, however, be accepted that such power of the Governor can be equated with the sovereign power of the legislature to make laws with respect to the assigned field. Law making power of the legislature with respect to judicial service without encroaching upon the subjects covered by Article 233 to 236 has impliedly been acknowledged by this Court in B.S. Yadavs Case (supra). The High Court of Mysore in K.N. Chandra Sekhars case (supra) while referring to Articles 233 and 309 had made certain observations which have been relied upon by Patna High Court in the impugned judgment. In that case the High Court of Mysore in fact was not called upon to decide the issue of the finality of the rules made under Article 234 of the Constitution in relation to a law made under Article 309. In the case before Mysore High Court, the dispute had arisen with respect to the appointments to the posts of munsiffs in judicial service of the State of Mysore. The Public Service Commission of the State conducted a competitive examination under the rules made for the purposes by the Governor of the State under Article 234 and proviso to Article 309 of the Constitution. The candidates who took the examination but did not succeed challenged the notification of the Public Service Commission on the ground of its being without lawful authority. The notification of the Public Service Commission was impeached on the ground that since the rules did not prescribe the criterion by which the success of candidates should be determined, there was no criterion by which the Commission could have determined whether a candidate has succeeded or failed and it was not upon the Commission to prescribe for itself a criterion not found in the rules. The Commission had applied a formula for ascertaining the names of the successful candidates by fixing 45% as qualifying marks for the candidates belonging to Scheduled Caste and Scheduled Tribes and 55% for others. It was further claimed that power of the Governor to fix the qualifying marks was impliedly delegated to the Commission. In that context the High Court examined Article 234 of the Constitution and observed: "It is reasonably clear that the purpose of Article 234 is that the collective wisdom of the Governor, the High Court and the Public Service Commission should regulate appointments referred to in that article, and it is plain that no rule made without the required consultation can have any effect or potency. It is obvious that within the range of the many matters requiring such collective deliberation would fall a multitude of subjects such as the determination of the question whether the appointments should be made on the basis of an examination, and if so, of what pattern, the selection of the subjects in which the candidates should be examined, the determination of the qualifying and maximum marks, the appointment of the authority to conduct the examination, the qualifications and disqualifications of

the candidates and the like."

It further held:

> "If, on its true construction, Art.234 does not require that standard to be specified or formulated by a rule, then alone, could it be said that the Governor could delegate that function to another. That article is a special constitutional provision removing from the provisions of Art.309 certain appointments to the judiciary and enjoining the Governor to make them in accordance with rules enacted in consultation with the High Court and the Public Service Commission. What are the matters about which the Governor is required to consult the High Court and the Public Service Commission. The Public Service Commission, it is obvious, was required to be consulted in regard to matters in which it had special competence to offer advice. The High Court was required to be consulted so that its advice may be obtained as to how and in what manner the appointments to a service under its control may be satisfactorily made."

It was conceded that there was no rule prescribing the qualifying marks. Nor was the power to determine those qualifying marks expressly delegated to any legislative authority. In that case the State had prayed for placing the construction on Article 320(3) to the effect that the clause did not require the Governor or the legislature functioning under Article 309 of the Constitution to consult the Public Service Commission for determination of the qualifying marks and that it was open to the legislature or the Governor, as the case may, to determine and fix those qualifying marks without such consultation. The court found that the provisions of Article 320(3) were so comprehensive which did not admit the interpretation sought for. The determination of qualifying marks was held to be an integral part of scheme for an examination because the examination was the method applied for recruitment for testing the suitability of candidates to the judicial service. The Court observed that "the construction suggested by Mr.Advocate General which makes it possible for the legislature or the Governor to decline to consult Public Service Commission on the determination of the qualifying marks and to that extent diminishes the utility of the construction and makes it futile and illusory, cannot merit acceptance". Consultation required under Article 234 was held to extend to everyone of the matters on which Article 320(3) enjoined consultation. The qualifying marks secured in a competitive examination prescribed by rules made under Article 234 shall form the subject matter of consultation by the governor with the High Court and the Public Service Commission. While striking down the selection, the Court held that it shall be open to the Governor to make appropriate rule determining the qualifying marks and to the Public Service Commission to conduct another viva-voce examination in accordance with those Rules. No Act of legislature made on the subject was in issue warranting observations made in para 23 of the judgment. Otherwise also while dealing with Chandra Shekar's case(supra) Brother Majmudar,J. has rightly concluded: "Somnath Iyer, J., speaking for the Division Bench observed that: 'Article 234 excepts out of the operation of Art.309, appointments to judicial service and constitutes the Governor in a sense a select legislative organ for enactment of rules for the purpose'. The aforesaid observation will of course have to be read down in the light of the Constitution Bench decision of this Court in B.S. Yadav's case (supra)."

In M.I. Nadafs case(supra) relying on K.N. Chandra Sekhars case the High Court of Mysore held that the Rules framed by the Governor under Article 309 of the Constitution could not override the Rules made by him under Article 234 of the Constitution. The petitioner in that case had relied upon the Rules framed under proviso to Article 309 of the Constitution dealing with recruitment generally for the Mysore State Civil Services whereas specific Rules pertaining to the judicial service had earlier been framed under Article 234 of the Constitution. After referring to K.N. Chandra Sekhars case the Court held: "From a reading of that decision, it is clear that no rule relating to the appointment of the persons mentioned in Article 234 of the Constitution can be validly made by the Governor without consulting either the High Court or the Public Service Commission. As seen earlier, the Mysore Munsiffs (Recruitment) Rules, 1958 prescribed the age limits for the appointments of the Munsiffs. Rules therein were made by the Governor under Article 234 of the Constitution in consultation with the High Court and the Public Service Commission. Any variation of that rule can only be made under Article 234 and that in accordance with the requirements of that Article. As seen earlier "Rules" do not comply with the requirements of Article 234. That being so, we are unable to accept the contention of Mr.Javali, the learned counsel for the petitioner that the age qualification prescribed under the Munsiffs (Recruitment) Rules stood modified by rule 6(4)(b) of the "Rules". Our view that appointments to judicial services of the State other than that of the District Judges should be made only in accordance with the rules made by the Governor under Article 234 of the Constitution after consultation with the State Public Service Commission and the High Court exercising jurisdiction in relation to such State and not under rules framed by him under Article 309 of the Constitution is also supported by the decision of the Madras High Court in N.Devasahayam v. State of Madras AIR 1958 Mad 53 and that of the Rajasthan High Court in Rajvi Amar Singh v. State of Rajasthan AIR 1956 Raj. 104."

It is true that if there is a conflict between the Rules framed under Article 234 of the Constitution and the Rules made under Article 309, the latter Rules, in so far as they relate to Subordinate Judiciary shall be ineffective and not applicable. However, main Article 309 cannot be made subject to the provisions of Article 234 except to the extent indicated in Chapter VI. In other words, the appropriate legislature would be competent to make laws if authorised under Chapter XI read with Seventh Schedule of the Constitution. In case of conflict between the Rules made under Article 234 and the laws made by the appropriate legislature, the Rules would give way to the laws made by the sovereign legislature. Such law made, however, may be declared invalid or inapplicable to the judicial service if it in any way undermines the independence of judiciary or otherwise encroaches upon the constitutional guarantees under aforesaid Chapter VI or is violative of the Fundamental Rights. Giving any other interpretation would amount to usurping the power of the sovereign legislature. Such an approach would be nugatory to the concept of Parliamentary Democracy adopted by the people of India for their governance. There cannot be two opinions that the Parliamentary Democracy is one of the basic features of the Constitution which nobody can alter, modify or substitute even in exercise of the constitutional powers conferred upon the Parliament under Article 368 of the Constitution. The High Court of Patna, therefore, fell in error in holding that the law made by the sovereign legislature in exercise of the powers vesting in it under Article 309 or Part XI read with Seventh Scheduled of the Constitution was not applicable to the judicial service of the State of Bihar. From the scheme of the Constitution with particular reference to Part VI, Chapter VI, Part XIV Chapter I, Part XI Chapter I and Seventh Schedule of the Constitution what

emerges is that: (i) The constitutional-makers had given a special status and treatment to the judicial service; (ii) That the independence of judiciary is ensured which cannot be interfered with either by an executive action or by an act of legislature; (iii) That the conditions of service spelt out in Chapter VI of the Constitution cannot be altered, modified or substituted either by rule making power or by legislation made in exercise of the powers under Article 309 of the Constitution; (iv) Rules made under Article 234 have primacy in the matter of appointment/recruitment, discipline and control of the judicial service and even such rules cannot take away from persons belonging to the judicial service any right of appeal which they may have under the law regulating the conditions of their service or as authorising the High Court to deal with them otherwise than in accordance with the conditions of their service prescribed under such law; (v) The provisions of Chapter VI of Part VI and the powers conferred upon the appropriate legislature and the Governor under Article 309 are complementary and supplementary to each other subject to the conditions of ensuring the independence of judiciary; (vi) That in case of conflict between the rules made under Chapter VI and under Article 309, the rules specifically framed under Article 234 of the Constitution would prevail and the rules made under Article 309, to that extent, shall give in their way; (vii) That the Parliament or the State Legislature can legislate upon any matter including the matters relating to the judicial service provided the legislation is permitted under Part XI, Chapter I read with Seventh Schedule and is not in conflict with other provisions of the Constitution and rights guaranteed in favour of the judicial service by the Constitution itself under Part VI Chapter VI; (viii) Even if any law made by the appropriate legislature is held to be made with plenary power of legislation and not in conflict with Part VI Chapter VI, being subject to Judicial Review, it can be challenged if it violates the Fundamental Rights or any other provision of the Constitution; ix) As in the case of Rules made under Article 234 of the Constitution, it is expected that if any rules are intended to be made by the executive under Article 309 with respect to the judicial service, the High Court shall be consulted and its views given due weight while making such rules. It is needless to say that in the process of consultation, the concerned High Court shall keep in mind the constitutional obligations of the State under Part III, Part IV or any other provision of the Constitution. x) The conclusions enumerated hereinabove are, however, not applicable to the higher judiciary constituted and established under Part V Chapter IV and Part VI Chapter V of the Constitution. In view of the position of law as enunciated hereinabove, the findings of the High Court in the impugned judgment in so far as it holds that the impugned Act is not applicable to the judicial service cannot be sustained and is liable to be set aside. Admittedly, the impugned Act has not been challenged on any other ground. It is not the case of the respondent that the Act is violative of any of the Fundamental Rights or in violation of any constitutional provision or it tampers with the independence of judiciary. The impugned Act does not in any way usurp the power of the High Court to make recommendations for appointment of District Judges and direct promotions or appointment of persons other than District Judges to the judicial service. After enacting the law in accordance with the constitutional provisions, the selection for appointment of the persons to the judicial service has been left to the wisdom and at the discretion of the High Court. The High Court has not in any way been deprived of making the selection of the best available candidates if they otherwise fulfil the eligibility criteria and come within the parameters prescribed by law. Despite the impugned Act, making reservations, the power of the High Court in the matter of appointments has not been curtailed as apprehended. Appointments on the basis of reservation can be made of only such persons who are found eligible and recommended by the High Court. The Governor or the executive

cannot appoint any person of their own from the reserved categories. Once reservations are made, the High Court is absolutely within its powers to fix the category and suitability to make selection for recommendation. The independence of judiciary has not, in any way, been taken away by the exercise of legitimate powers by the legislature. By exercise of its power the legislature does not appear to have interfered with the overall control of the High Court over the subordinate judiciary. Even though the appropriate authority to make the appointments is the Governor, yet the power of the High Court or the independence of judiciary is not undermined because the power to make the appointment conferred upon the Governor has to be exercised by him in consultation with the High Court. This Court in M.M. Gupta & Ors.v. State of J & K & Ors. [AIR 1982 SC 1579], after referring to a catena of authorities, concluded: "We are of the opinion that healthy convention and proper norms should be evolved in the matter of these appointments for safeguarding the independence of the judiciary in conformity with the requirements of the Constitution. We are of the opinion that normally, as a matter of rule, recommendations made by High Court for the appointment of a District Judge should be accepted by the State Government and the Governor should act on the same. If in any particular case, the State Government for good and weighty reasons find it difficult to accept the recommendations of the High Court, the State Government should communicate its views to the High Court and the State Government must have complete and effective consultation with the High Court in the matter. There can be no doubt that if the High Court is convinced that there are good reasons for the objections on the part of the State Government, the High Court will undoubtedly reconsider the matter and the recommendations made by the High Court. Efficient and proper judicial administration being the main object of these appointments, there should be no difficulty in arriving at a consensus as both the High Court and the State Government must necessarily approach the question in a detached manner for achieving the true objective of getting proper District Judges for due administration of justice."

This Court in Indra Sawhney & Ors. vs. Union of India & Ors. [1992 Supp. (3) SCC 217] has held that reservation is a remedy for historical discrimination and its continuing ill-effects. Poverty demands affirmative action. Its eradication is a constitutional mandate. The purpose of Article 16(4) is to give adequate representation in the services of the State to that class which has no representation. This Articles carves out a particular class of people and not individuals from the weaker sections and the class it carves out is the one which does not have adequate representation in the services of the State. Pandian J., in his concurring but separate judgment had observed: "Though 'equal protection' clause prohibits the State from making unreasonable discrimination in providing preferences and facilities for any section of its people, nonetheless it requires the State to afford substantially equal opportunities to those, placed unequally.

The basic policy of reservation is to off-set the inequality and remove the manifest imbalance, the victims of which for bygone generations lag far behind and demand equality by special preferences and their strategies. Therefore, a comprehensive methodological approach encompassing jurisprudential, comparative, historical and anthropological conditions is necessary. Such considerations raise controversial issues transcending the routine legal exercise because certain social groups who are inherently unequal and who have fallen victims of discrimination require compensatory treatment. Needless to emphasise that equality in fact or substantive equality involves the necessity of beneficial treatment in order to attain the result which establishes an equilibrium

between two sections placed unequally."

The majority judgment further held that power of "State" to make any provision under Article 16(4) does not necessarily mean that such provision be made only by Parliament or any State Legislature. Government can also introduce reservation by executive orders as appears to have been practised in Bihar also so far as subordinate judicial service is concerned. As the impugned Act making reservation in the services including the judicial service has not been challenged on the grounds of being violative of Fundamental Rights or in contravention of any constitutional provision there is no necessity of testing its constitutional validity on the aforesaid touchstones. In view of this position of law it has to be now ascertained as to whether the impugned Act had really made any provision of reservation in the judicial service as well or not. The High Court on perusal of its various provisions has held that the Act did not relate to the judicial service and the insistence of the Government of Bihar to issue notifications in accordance with the said Act by making provision for reservation was uncalled for. While interpreting the words "office or department" occurring in the definition of term "establishment" under Section 2(c) of the Act, the Court held that the aforesaid words referred to the office or department of the Court and not the Court itself. It further held that reservation of posts in the judicial service de hors of the Reservation Act was not permissible. Intepreting Section 4, the High Court observed: "The correct construction of Section 4, in the context, read with Section 2(c) and 2(n), would be something like this--

All appointments to service and posts in any office or department (i.e. establishment) of the judiciary by direct recruitment shall be regulated in the following manner."

The findings of the High Court cannot be upheld in view of the clear provisions made in Bihar Act No.3 of 1992. The Preamble of the Act states that it has been enacted to provide for adequate representation of Scheduled Castes, Scheduled Tribes and other Backward Classes in posts and services under the State. Section 2(a) defines "Appointing authority" in relation to a Service or post in an establishment to mean the authority empowered to make appointment to such services or posts; Section 2(c) defines "Establishment" as "any office or department of the State concerned with the appointments to public services and posts in connection with the affairs of the State and includes (i) local or statutory authority constituted under any State Act for the time being in force, or (ii) a co-operative institution registered under the Bihar Co-operative Societies Act, 1935 (Act 6 of 1935) in which share is held by the State Government or which receives aid from the State Government in terms of loan, grant, subsidy, etc. and (iii) Universities and Colleges affiliated to the Universities, Primary, Secondary and High Schools and also other educational institutions which are owned or aided by the State Governments and (iv) an establishment in public sector"; Section 2(f) defines "Reservation" to mean, reservation of vacancies in posts and services for Scheduled Castes/Scheduled Tribes and Other Backward Classes; Section 2(n) defines "State" to include the Government, the Legislature and the Judiciary of the State of Bihar and all local or other authorities within the State or under the control of the State Government. Section 3 refers to the "Services" to which the Act has not been made applicable. Section 4 mandates that all appointments to the Services and Posts in an establishment which are to be filled by direct recruitment shall be regulated in the manner prescribed therein. 50% of the available vacancies are to be filled up from open merit category and 50% from reserved category. The vacancies from different categories of reserved

candidates from amongst the 50% the reserved categories shall, subject to other provisions of the Act, be as follows: (a) Scheduled Castes 14% (b) Scheduled Tribes 10%

(c) Extremely Backward Class 12% (d) Backward Class 8% (e) Economically Backward Woman 3% (f) Economically Backward 3%

------ Total 50% Section 5 of the Act provides: "Review of Reservation Policy.--(1) It shall be the duty of the State Government to strive to achieve the representation of the Scheduled Castes/Scheduled Tribes and other Backward Classes in the various services of posts of all the establishments of the State as defined in clauses (c) and (d) of Section 2 in the proportion fixed for various reserved categories under Section 4.

(2) The State Government shall review its reservation policy after every ten years:

> Provided that every order made under sub-section (2) shall be laid as soon as may be after it is made, before the State Legislature while it is in session for a total period of fourteen days which may be comprised in one or in two successive sessions."
>
> The aforesaid Act was amended by Act No.XI of 1993 by which amongst others Sub-section (2) of Section 4 was substituted prescribing the extent of percentage of reservations. Similarly clause (c) of sub-section (6) of Section 4 was substituted prescribing the manner of filling the vacancies in case of non-availability of suitable candidates in the reserved categories. Clause (e) of sub-section (6) of Section 4 was substituted providing:
>
> "(e) If required number of candidates of Scheduled Castes, Scheduled Tribes and Extremely Backward Classes and Backward Classes and Women of Backward Classes are not available for filling up the reserved vacancies, fresh advertisement may be made only for the candidates belonging to the members of Scheduled Castes, Scheduled Tribes and Extremely Backward and Bacward Classes and Women of Backward Classes, as the case may be, to fill the backlog vacancies only."

A combined reading of the various provisions of the Act leave no doubt that it is also applicable to the establishment of judicial service and "not only to the office or department of the Court, excluding the Court itself", as has been held in the impugned judgment. No other interpretation is possible in view of the definitions of "establishment" and "State" in Sections 2(c) and 2(n) of the Act. It was not correct for the High Court to say that the aforesaid language of the statute was capable of more than one interpretation and for that such interpretation which is not absurd or inconsistent should be followed. The Court is required to interpret statute as far as possible agreeable to justice and reason. While interpreting a statute the courts have to keep in mind the underlying policy of the statute itself and the object sought to be achieved by it. This Court in Nasiruddin vs. State Transport Appellate Tribunal [AIR 1976 SC 331] held: "If the precise words used are plain and unambiguous, they are bound to be construed in their ordinary sense. The mere fact that the results of a statute may be unjust does not entitle a court to refuse to give it effect. If there are two different

interpretations of the words in an Act, the Court will adopt that which is just, reasonable and sensible rather than that which is none of those things. If the inconvenience is an absurd inconvenience, by reading an enactment in its ordinary sense, whereas if it is read in a manner in which it is capable, though not in an ordinary sense there would not be an inconvenience at all; there would be reason why one should not read it according to its ordinary grammatical meaning. Where the words are plan the court would not make any alteration."

It is not correct as held by the High Court in the impugned judgment that interpreting the statute in favour of the appellant State, as desired, "would amount to relegating the judicial service at par with not only the secretarial staff or the administrative, executive or council of ministers and legislature but also their own staff. That would be contrary to law laid down by the Apex Court in All India Judges Case (supra)". It appears that to arrive at such a conclusion the High Court was also persuaded and impressed on account of the statement before it that the provisions of the Reservation Act had been declared to be ultra vires, as regards the Bihar Subordinate Judicial Service i.e., as regards recruitment of judicial officers other than that of the District Judges in the case of Deepak Kumar Singh & Others. Interpretation of Section 4 as put in by the High Court, if accepted, would not only frustrate the purpose and object of the Bihar Act No.3 of 1992 but also be contrary to the mandate of the Constitution as enshrined in its Part III and further declared in Part IV, Article 56 and Article 335 of the Constitution. The High Court is thus held to have fell in error of law in declaring the Act as ultra vires in so far as its applicability to the judicial service is concerned, and also in the matter of interpretation of its various provisions. The appeals are accordingly allowed by setting aside the judgments impugned therein with a direction to the respondents to fill up the vacancies in accordance with the Rules applicable and the provisions of the impugned Act without disturbing the appointments made till date on the basis of this Courts order. The seniority of the members of the judicial service shall be determined in accordance with the Service Rules applicable and the provisions of the Act by adjusting the candidates selected on reservation to fill in the reserved slots keeping in view the quota and rota rule as specifically pointed out by this Court in its order dated 16.11.1995. No costs.