Supreme Court of India
State Of Kerala vs A. Lakshmikutty & Ors on 10 November, 1986
Equivalent citations: 1987 AIR 331, 1987 SCR (1) 136
Author: A Sen
Bench: Sen, A.P. (J)

PETITIONER:
STATE OF KERALA

Vs.

RESPONDENT:
A. LAKSHMIKUTTY & ORS.

DATE OF JUDGMENT10/11/1986

BENCH:
SEN, A.P. (J)
BENCH:
SEN, A.P. (J)
RAY, B.C. (J)

CITATION:
1987 AIR 331 1987 SCR (1) 136
1986 SCC (4) 632 JT 1986 818
1986 SCALE (2)773
CITATOR INFO :
RF 1989 SC 49 (16,19)

ACT:
Judicial Review of the act of Governor not to appoint candidates for Dt. Judges' post as recommended by the High Court and Writ of Mandamus, issuance of--Whether the High Court could issue a writ of mandamus to the Governor of the State directing him to act as per the recommendation of the High Court to fill up the vacancies in the posts of District Judges reserved for direct recruitment from the practising members of the bar under Article 233(1) of the Constitution--Constitution of India, 1950, Articles 163(1), 226 and 233 read with Rule 2(b) of the Kerala State Higher Judicial Rules, 1961 and Rule 14(c) of the Kerala State and Subordinate Service Rules, 1958.

HEADNOTE:
Rule 2(b) of the Kerala State Higher Judicial Service Rules, 1961 requires that the cycle of rotation governing reservation of posts as laid down in Rule 14(c) of the Kerala State and Subordinate Service Rules, 1958 be followed in the selection and appointment of District Judges by direct recruitment. Under Rule 14(c) appointments shall be

made in the order of rotation specified therein in every cycle of 20 vacancies. It is not often that there is no eligible candidate available from a community or group of communities. To meet such a situation, r. 15(a) provides that if a suitable candidate is not available for selection from any particular community or group of communities specified in the annexure, the said community or group shall be passed over and the post filled by a suitable candidate from the community .or group of communities immediately next to the passed over communitY or group in the order of rotation. Rule 15(b) enjoins that if a suitable candidate is not available for selection from the group of communities classified as "Scheduled Castes", in the turn allotted for such a group in the annexure, the said group shall be passed over and the post Shall be fired by a suitable candidate from the group of communities classified as "Scheduled Tribes" and vice-versa. If no suitable candidate for selection in any of the two groups namely, Scheduled Castes and Scheduled Tribes is available, the vacancy has to be filled by open competition. Rule 15(c) provides for restoration of the benefit of the turn forfeited at the earliest opportunity. Proviso thereto however enjoins that the restoration of the benefit of the turn forfeited by the carry-forward rule,
137
shall not exceed 50% of the vacancies to be filled in a particular year. Rule 16 provides for sub-rotation among major groups of other backward classes. Rule 17(1) lays down the manner in which appointments have to be made from candidates belonging to other backward classes. Other backward classes are enumerated in List III to Part I of the Rules and there are 73 communities or groups divided into 8 categories specified in Rule 17(1). Categories 1 to 7 are Ezhavas and Thiyyas, Muslims, Latin-Catholics and Angin-Indians, Nadars, Scheduled Castes converts to Christianity, Viswakarmas and Dhooravas. All other backward classes put together constitute the 8th category. Rule 17(2) provides for sub-rotation among the other backward classes. In the last recruitment made in the year 1978 appointments had been made upto 7th turn in the cycle of rotation.

The Committee of three senior most Judges constituted by the Full Court interviewed the candidates and drew up a list of fifteen candidates adjudged on an overall assessment of the merits. One of the fifteen' candidates Ms. Mary Teresa Dias belonging to the Latin Catholic community, however, was considered unsuitable for appointment by the Committee by a majority of 2:1. On an approval of the revised panel of fourteen candidates by the Full Court by a majority at a meeting held on 12.6.1984, the said list was sent to the Chief Minister. As there was no candidate belonging to the 'Latin-Catholics and Anglo-Indians', 'Other Backward Classes and 'Scheduled Castes and Scheduled Tribes', 8th, th and 12th in the cycle of rotation, the first vacancy had be filled by reason of rule 15(a) of the Rules by a suitable

candidate belonging to the community or group of communities immediately next to the passed over community or group i.e. by respondent No. 1 Smt. A. Lakshmikutty, a member of the 'Ezhava' community, 6th in order of merit, failing in the group 'Ezhavas', Thiyyas and Billavas', 14th in the cycle of rotation. The second vacancy i.e. 9th in the cycle rotation had to be filled by respondent No. 3, Krishnan Nair, 1st in order of merit, by open competition. The third vacancy had to go to 'other Backward Classes', 10th in the cycle of rotation. As there was no 'other Backward Classes' candidate belonging to the 'Scheduled Castes and Scheduled Tribes', 10th and 12th in the cycle of rotation, it had to be filled by a Muslim candidate C. Khalid, respondent No. 4 who was 5th in order of merit and 16th in the cycle of rotation. The fourth vacancy had to be filled by a candidate on the basis of open competition i.e. by respondent No. 5 Achuthan Unni, 2nd in order of merit and 11th in the cycle of rotation. The fifth vacancy was to be filled by respondent No. 6 Rajappan Asari, a Viswakarma, 4th in order of merit and 2Oth in the cycle of rotation.

138

Shortly thereafter, on June 27, 1984, Ms. Mary Teresa Dias filed a petition under Article 226 of the Constitution for grant of a writ of mandamus claiming her right to the first vacancy being a candidate belonging to the Latin-Catholic and Anglo-Indian community with a direction to the State Government not to fill up any of the five vacancies in the post of District Judges without inclusion of her name in the panel and a further direction to the High Court to forward her name for appointment as a District Judge. The said writ petition was however dismissed later on.

Subsequently pursuant to a news item appearing on 31.1.1985 in several malayalm newspapers to the effect that the cabinet as its meeting held on 30. I. 1985 had decided to appoint only four out of the said five candidates leaving A. Lakshmikutty sixth in order of merit belonging to the Ezhava community as one post was to be kept vacant for a candidate belonging to the group of Latin-Catholic Anglo-Indian community, Respondent No. 1 Smt. Lakshmikutty moved the High Court by a petition under Article 226 of the Constitution for grant of an appropriate writ, direction or order to quash the decision of the Council of Ministers dated January 30, 1985 deciding not to appoint her as per the panel sent up by the High Court. Her application for grant of an ad-interim prohibitory order to restrain the State Government from appointing only Respondents 3 to 6 as District Judges as per the Cabinet decision was ordered by a learned Single Judge on a prima facie case being made out.

The State Government having been restrained from making the appointments for a period of one month. i.e. till March 20, 1985, the matter of direct recruitment of District Judges from the bar again came up before a meeting of the Council of Ministers held on February 28, 1985. The Govern-

ment reconsidered the whole question of direct recruitment of District Judges from the bar afresh and decided not to appoint anybody from the panel of names recommended by the High Court due to non-representation of 'Latin-Catholics and AngloIndians' 'Other Backward Classes' and 'Scheduled Castes and Scheduled Tribes', 8th, 10th, and 12th turns in the cycle of rotation, However, the Kerala High Court allowed the writ petition filed by Respondent A. Lakshmikutty by its judgment and order dated 29.4.1985, quashed the Cabinet decisions of 30.1.1985 and 28.2.1985 and issued a writ in the nature of mandamus directing the respondents-State to fill up five vacancies in the posts of District Judges meant for direct recruitment from the bar, by the appointment of Respondents t and 3 to 6 as recommended by the High Court under Article 233 (1) of the Constitution. Hence the State appeals, by special leave.

139

Allowing the appeals and modifying the order, the Court,

HELD: 1.1 The power of appointment of persons to be District Judges conferred on the Governor, meaning the State Government, under Art. 233(1) in consultation with the High Court is executive function. 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 Art. 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. Therefore, the 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. But, the consultation between the Governor and the High Court in the matter of appointment of District Judges under Article 233 (1) must not be an empty formality but real, full and effective. [156H-I57E]

Chandra Mohan v. State of U.P. & Ors., [1967] 1 SCR 77; A Panduranga Rao v. State of Andhra Pradesh & Ors., [1967] 1 SCR 620; Mani Subrat Jain v. State of Haryana & Ors., [1977] 2 SCR 361; M.M. Gupta & Ors. v. State of Jammu & Kashmir & Ors., [1983] 1 SCR 593; Chandra mouleshwar Prasad v. Patna High Court & Ors., [1970] 2 SCR 666; High Court of Punjab & Haryana etc. v. State of Haryana, [1975] 3 SCR 368; and Union of India v. Sankalchand, Himatlal Sheth & Anr., [1977] 4 SCC 193, referred to.

1.2. As well-settled the duty of the Governor to consult the High Court in the matter of appointment of District Judges is so integrated with the exercise of his power that the power can only be exercised in the manner provided by Art. 233(1) or not at all. Normally, as a matter of Rule, the recommendations of the High 'Court for the appointment of a District Judge should be accepted by the State Govern-

ment and the Governor should act on the same. If, in any particular-Case, the State Government for 'good and weighty reasons' finds it difficult to accept the recommendations of the High Court, the State Government should communicate its views to the High Court and must have complete and effective consultation with the High Court in the matter. In the instant case, therefore, before rejecting one panel forwarded by the High Court, the State Government should have conveyed its views to the High Court to elicit its opinion. [I66C-E]

The fulfilment by the Governor of his constitutional obligation to

140

place full facts before the High Court was a pre-condition before the State Government could arrive at a decision not to appoint respondents Nos. 1 and 3-6 as District Judges. On its part, there was a constitutional obligation cast on the High Court under Art. 233(1) to express its opinion on a consideration of the facts and circumstances on the basis of which alone the nature of the problem could be appreciated and the right decision taken. Therefore, the State Government was wrong in taking a unilateral decision to cancel all steps taken in pursuance of the notification dated September 24, 1983 and to issue a fresh notification inviting applications, without taking the High Court 'into confidence. And the proper course for the High Court to adopt was to have issued a writ in the nature of mandamus requiring the State Government to place before the High Court the facts i.e. the difficulties as expressed in the letter of the Chief Minister dated March 4, 1985 to elicit its opinion. [166G-167A]

1.3 The respective powers of the three wings of the State are well-defined with the object that each wing must function within the field earmarked for it. The objects of such demarcation is to exclude the possibility of encroachment on the field earmarked for the wing by the other or theirs. As long as each wing of the State functions within the field carved out and shows due deference for the other two branches, there would arise no difficulty in the working of the Constitution. But, when one wing of the State tries to encroach on the field reserved for the other, special responsibility devolves upon the Judges to avoid an overactivist approach and to ensure that they do not trespass within the spheres earmarked for the other two branches of the State. Therefore, the High Court could not intervene at a stage where the Council of Ministers had reviewed the situation and decided to reject the panel sent by the High Court and not to appoint any of the five advocates to be District Judges except by issuing a writ in the nature of mandamus requiring the State Government to refer back the matter to the High Court for reconsideration. [168F-169A].

2.1 It is well-settled that a writ of mandamus is not a writ of course or a writ of right, but is, as a rule, discretionary. There must be a judicially enforceable right for

the enforcement of which a mandamus will lie. The legal right to enforce the performance of a duty must be in the applicant himself. In general, therefore, the Court will only enforce the performance of statutory duties by public bodies on application of a person who can show that he has himself a legal right to insist on such performance. [165C]

2.2 The issuance of a writ of mandamus by the High Court direct-

141

lag the State Government i.e. the Governor to act on the recommendation of the High Court to fill up the five vacancies in the posts of District Judges meant for direct recruitment from the members of the bar under Art. 233(1) was constitutionally impermissible. Although the High Court was not oblivious that the 'advice' of the Council of Ministers to reject the panel of fourteen names submitted by the High Court could not be subject to judicial review and that Art. 163(1) of the Constitution, precludes an inquiry as to the nature of the advice given by the Council of Ministers to the Governor, still it has issued a writ in the nature of mandamus upon the basis that it is called upon to adjudge the legality and propriety of the two decisions taken by the State Government through the instrumentality of the Council of Ministers. By doing so, the High Court has virtually tendered an advice to the Governor to act on the recommendation of the High Court i.e. contrary to the advice of the Council of Ministers and thereby entered into the process of decision making which as constitutionally impermissible. The Governor has to act on the advice of the Council of Ministers under Art. 163(1) in the matter of appointment of District Judges under Art. 233(i) and not on the advice of the High Court. Appointment of persons to be, and posting and promotion of, District Judges by the Governor under Art. 233(1) is purely an executive function The High Court therefore had no authority or jurisdiction to issue any writ of mandamus of the kind complained of. It was certainly not open to the High Court to embark Upon an inquiry as to the reasons which impelled the Council of Ministers at the meeting held on February, 28, 1985 to review the decision taken on January 30, 1985 and decide not to appoint anyone as a District Judge under Art. 233(1) from the panel of names drawn up by the High Court. It was also not justified in observing that the reasons as disclosed by the Chief Minister in his letter dated March 4, 1985 on the basis of which the Council of Ministers on February 28, 1985, decided not to appoint respondents Nos. 1 and 3-6 as District Judges on the recommendation of the High Court namely due to non-representation of certain important communities or groups of communities, were no reasons at all and in any event, the reasons given were bad in law. There is no basis for the ridding reached by the High Court. [167B-D, 164E-G]

3. Normally, the principle of passing over laid down in Rule 15(a) of the Kerala State and Subordinate Service

Rules, 1958 is an integral part of the process of appointment and therefore the Government being the appointment authority would have the right to take a decision in the matter. But the Government failed to appreciate that the High Court plays a decisive rule in the matter of appointment of District Judges under Art. 233(1). Adjudging suitability of a candidate for appointment
142
as a District Judge under Art. 233(1) is a function of the High Court which must necessarily imply that if the High Court finds that the candidate belonging to a particular community or group is not suitable for appointment, it has to find a candidate from the community or group next following in the cycle of rotation. It must logically follow, as a necessary consequence that it is for the High Court to decide whether or not a particular community or group should be passed over under r. 15(a) of the Rules for want of a suitable candidate and the vacancy be filled up from the community or group immediately next to the passed over community or group in the order of rotation or sub-rotation provided in rule 14(c). All that the State Government could do was to convey to the High Court the difficulties faced by the Government in implementing the recommendations. It must accordingly be held that the State Government wrongly assumed to itself the power to decide the question whether the principle of passing over laid down in r. 15(a) of the Rules should be resorted to or not. [169F-170B]

4. Whatever the Council of Ministers may say in regard to a particular matter, does not become the action of the State Government till the-advice of the Council of Ministers is accepted or deemed to be accepted by the Head of the State. Before an advice of the Council of Ministers amounts to an order of the State Government, there are two requirements to be fulfilled, namely; (1) The order of the State Government had to be expressed in the name of the Governor as required by Art. 166(1) and (2) It has to be communicated to the persons concerned. It must therefore follow' that unless and until the decision taken by the Council of Ministers on JanUary 30, 1985 was translated into action by the issue of a notification expressed in the name of the Governor as required by Art. 166(1), it could not be said to be an order of the State Government. Until then, the earlier decision of the Council of Ministers was only a tentative one and it was therefore fully competent for the High Court to reconsider the matter and come to a fresh decision. [170E-G]

State of Punjab v. Sodhi Sukhdev Singh, [1961] 2 SCR 371; and Bachhittar Singh v. State of Punjab, [1962] Suppl SCR 713, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 4224- 27 of 1985.

From the Judgment and Order dated 29.4.1985 of the Kerala High Court in O.P. Nos. 905, 2732, 2781 and 3243 of 1985.

143 G. Viswanatha Iyer and Mrs. Baby Krishnan for the Appellant.

T.S. Krishnamoorthi, P. Subramonian Poti, T. Sridharan, A.S. Nambiar, P- Parameshwarn, Mrs. Santa Vasudevan, E.M.S. Anam, T.L. Viswanatha Iyer, S. Balakrishnan and Ramesh N. Keswani for the Respondents.

The Judgment of the Court was delivered by SEN, J. These appeals by special leave are directed against the judgment and order of the Kerala High Court dated April 29, 1985 quashing the Cabinet decisions of January 30, 1985 and February 28, 1985 and issuing a writ in the nature of mandamus directing the respondents to fill up five vacancies in the posts of District Judges meant for direct recruitment from the bar, by the appointment of respondents Nos. 1 and 3 to 6 as recommended by the High Court under Art. 233(1) of the Constitution. The issue involved is whether the issuance of a writ of mandamus by the High Court directing the Governor to act on the recom- mendation of the High Court to fill up the five vacancies in the posts of DiStrict Judges reserved for direct recruitment from the practising members of the bar under Art. 233(1) of the Constitution was constitutionally impermissible. By the judgment, a Division Bench of the High Court has held that although it was not oblivious that the 'advice' of the Council of Ministers to reject the panel of fourteen names forwarded by the High Court could not. be subject to judicial review and that Art. 163(3) of the Constitution precludes an inquiry as to the nature of the advice given by the Council of Ministers to the Governor, still it had the power to issue a writ in the nature of mandamus upon the basis that it was called upon to adjudge the legality and propriety of the decisions reached by the State Government through the instrumentality of the Council of Ministers. It was of the view that the reasons given on the basis of which the Council of Ministers on February 28, 1985 purported to review their earlier decision dated January 30, 1985 and decided not to appoint respondents Nos. 1 and 3 to 6 as District Judges on the recommendation of the High Court due to the non-representation of candidates belonging to the 'Latin-Catholics and Anglo-Indians', 'Other Backward Class- es' and 'Scheduled Castes and Scheduled Tribes', 8th, 10th and 12th in the cycle of rotation as provided in r. 14(c) of the Kerala State & Subordinate Services Rules, 1958, were no reasons at all and the action of the State Government in rejecting the panel sent by the High Court was arbitrary, illegal and improper.

The facts. At the instance of the High Court, the State Government issued a notification on September 24, 1983 inviting applications from eligible members of the bar to fill up three vacancies in the cadre of District Judges by direct recruitment from the bar. The notification stated that the number of candidates proposed to be selected were three, subject to variation according to the exigencies. Later, the number of vacancies was increased to five. There were a large number of candidates from the bar and the applications were forwarded by the State Government to the High Court with request to make its recommendations. The Full Court at a meeting held on March 15, 1984 constituted of Committee of three senior most Judges to prepare a panel of names. The

Committee interviewed the candidates and drew up a list of fifteen candidates adjudged as eligible on an overall assessment of the merits. One of the fifteen candi- dates was Ms. Mary Teresa Dias, District Government Pleader and Public Prosecutor of Ernakulam belonging to the Latin- Catholic community. It however appears that the Committee by a majority of 2:1 felt that she was not suitable for ap- pointment as a District Judge and accordingly deleted her name from the list of eligible candidates and drew up a panel of the remaining fourteen names. The panel of fourteen names submitted by the Committee was approved of by the Full Court by a majority at a meeting held on June 12, 1984. On June 14, 1984, the Actg. Chief Justice sent up to the Chief Minister the panel of fourteen names as settled by the High Court for appointment as District Judges from the bar. It was stated that the appointments had to be made according to the cycle of rotation governing reservation of posts as laid down in r. 14(c) of the Kerala State & Subordinate Services Rule, 1958, as required by r. 2(b) of the Kerala State Higher Judicial Service Rules, 1961. Accordingly, the appointments had to start with the first vacancy going to a candidate belonging to the 'Latin-Catholics and Anglo-Indi- ans' community, 8th turn in the cycle of rotation. As there was no candidate belonging to the 'Latin-Catholics and Anglo-Indians'. 'Other Backward Classes' and 'Scheduled Castes and Scheduled Tribes', 8th, th and 12th in the cycle of rotation, the first vacancy had to be filled by reason of r. 15(a) of the Rules by a suitable candidate belonging to the community or group of communities immediately next to the passed over community or group i.e. by respondent No. 1 Smt. A. Lakshmikutty, a member of the 'Ezhava' community, 6th in order of merit, falling in the group 'Ezhavas, Thiyyas and Billavas'. 14th in the cycle of rotation. The second vacancy i.e. 9th in the cycle of rotation had to be filled by respondent No. 3, Krishnan Nair, 1st in order of merit, by open corn-

petition. The third vacancy had to go to 'Other Backward Classes', th in the cycle of rotation. As there was no 'Other Backward Classes' candidates nor any candidate be- longing to the 'Scheduled Castes and Scheduled Tribes', 10 th and 12th in the cycle of rotation, it had to be filled by a Muslim candidate C. Khalid, respondent NO. 4 who was 5th in order of merit and 16th in the cycle of rotation. The fourth vacancy had to be filled by a candidate on the basis of open competition i.e. by respondent No. 5 Achuthan Unni, 2nd in order of merit and 11th in the cycle of rotation. The fifth vacancy was to be filled by respondent No. 6 Rajappan Asari, a Viswakarma, 4th in order of merit and 20th in the cycle of rotation.

Shortly thereafter on June 27, 1984 Ms. Mary Teresa Dias, the candidate belonging to the Latin-Catholic commu- nity moved the High Court by a petition under Art. 226 of the Constitution for grant of writs in the nature of manda- mus directing the State Government to forbear from filling up any of the five vacancies in the post of District Judges without inclusion of her name in the panel and for directing the High Court to forward her name for appointment as a District Judge.

On January 31, 1985 a news item appeared in the Mathrub- hoomy, and other Malyalam newspapers in the State to the effect that at a press conference held on that day the Chief Minister' briefed the press of a Cabinet meeting of the earlier day i.e. on January 30, 1985. It went on to say that the Government had decided to fill up four posts of District Judges from the panel of names recommended by the High Court and to keep one post vacant since there was a writ petition pending in the High Court. It was said that the fifth vacan- cy would also be filled after the decision of the

High Court. Further, the news item in Mathrubhoomy was to the effect that the Government had decided to appoint respond- ents Nos. 3 to 6 Krishnan Nair, C. Khalid, E. Achuthan Unhi and G. Rajappan Asari as District Judges from the bar on the recommendation to the High Court. There was some. controver- sy as to the meaning of some Malayalam words in the news item. According to learned counsel for the appellant the words meant 'it was proposed to appoint' while learned counsel for the respondents asserted that the meaning should be 'it was decided to appoint'. The State Government had therefore decided not to appoint respondent No. 1 Smt. A. Lakshmikutty belonging to the Ezhava community, 14th in the cycle of rotation, and one post was to be kept vacant pre- sumably for a candidate belonging to the group 'Latin-Catho- lics and Anglo-Indians', 8th in the cycle of rotation.

On the next day i.e. on February 1, 1985, respondent No. 1 Smt. A. Lakshmikutty moved the High Court by a petition under Art. 226 of the Constitution for grant of an appropri- ate writ, direction or order to quash the decision of the Council of Ministers dated January 30, 1985 deciding not to appoint her as a District Judge as per the panel sent up by the High Court. She by an application also prayed for grant of an ad-interim prohibitory order to restrain the State Government from appointing respondents Nos. 3 to 6 as Dis- trict Judges. The stay application was heard by a Single Judge for two days, on February 13 and 20, 1985. At the hearing on February 13, the learned Advocate-General stated that the Governor had not issued any order of appointment in favour of respondent Nos. 3 to 6 and gave an undertaking on behalf of the State Government that no such appointments would be made for a period of seven days. At the heating on February 20, the learned Advocate-General submitted that the period of seven days as indicated by him had expired and there was no longer any further commitment on the part of the State Government not to make' the appointments. He further stated at the bar that the news item that one post was kept vacant on account of the Writ Petition filed by the Latin-Catholic candidate Ms. Mary Teresa Dias was conect. He also revealed that the relevant records were lying with the Governor and could be made available only after getting the same from him.

The learned Single Judge by his order dated February 21, 1985 held that prima facie the Cabinet decision of January 30, 1985 deciding to leave out respondent No.1 Smt. A. Lakshmikutty, a candidate belonging to the Ezhava community falling in the group 'Ezhava, Thiyyas and Billavas', 14th in the cycle of rotation, was invalid and unless she was found to be unfit for appointment as a District Judge, the first vacancy could not be offered to any person. The relevant portion of the order reads:

"Prima facie, the decision appears to be contrary to rules 14 to 17 of the Kerala State & Subordinate Service Rules. First among the five vacancies, according to the records placed before me should go to a candidate belonging to Latin Catholic and Anglo Indian community, item 8 in the cycle of rotation. In the absence of such a candidate, the vacancy should go to a candidate in item 10 in the cycle of rota- tion. The penal does not contain names of any candidates who come within 8th, th or the 12th items in the cycle of rotation. Therefore, first vacancy should go to a candidate, failing in the 14th item in the cycle, namely, Ezhava."

Upon that view, the learned Single Judge issued a prohibito- ry order restraining the State Government from making any appointment of respondents Nos. 3 to 6 or any other candi- date as District Judges for a period of one month. The State Government having been restrained from making the appointments for a period of one month i.e. till March 20, 1985, the matter of direct recruitment of District Judges from the bar again came up before a meeting of the Council of Ministers held on February 28, 1985. The Govern- ment reconsidered the whole question of direct recruitment of District Judges from the bar afresh and decided not to appoint anybody from the panel of names recommended by the High Court due to non-representation of 'Latin-Catholics and Anglo-Indians' 'Other Backward Classes' and 'Scheduled Castes and Scheduled Tribes', 8th, 10th, 12th' turns in the cycle of rotation. Accordingly, the Chief Minister addressed a letter on March 4, 1985 to the Acting Chief Justice, the material portion of which reads as follows: "My dear Chief Justice, Sub: Direct recruitment of District Judges from the Bar.

Please refer to your letter No. R3/84(SS) dated 14.6. 1984 forwarding a panel of 14 candidates considered suitable by the High Court for appointment as District Judges direct from the Bar. You are aware that some O.Ps have been filed in the High Court in connection with the selection and appointment of the District Judges. In that context, Government have reviewed the entire issue of appointment to the five vacancies of Dis- trict Judges from the bar. The avowed policy of the Govern- ment is to give adequate representation to candidates be- longing to Scheduled Castes, Scheduled Tribes, Latin Catho- lics/Anglo Indians and Other Backward Communities as far as possible. Unfortunately we cannot implement this policy if appointment is made from the panel now prepared as it con- tains no candidates from these groups. As the vacancies that will occur for direct recruitment in the cadre of District Judges will be only few, the passing over of the communities cannot be made good in the near future. Consequently, the usual procedure of passing over communities unrepresented in the merit list will cause neglect of very backward communities for a long time. There have been many writs filed questioning the selections.

Having due consideration to the above facts, Government have decided to cancel all steps taken so far on the basis of applications received in response to notifica- tion dated 24th September, 1983, and to invite fresh appli- cations and to do recruitment of District Judges from the Bar on the basis of such fresh applications."

The State Government in the return filed before the High Court questioned the authority and jurisdiction of the High Court to issue a writ of mandamus requiring the Governor to act contrary to the decision. of the Council of Ministers taken on February 28, 1985 and to appoint respondents Nos. 1 and 3 to 6 to be District Judges under Art. 233(1) of the Constitution from amongst the members of the bar as per its recommendations. It was pleaded inter alia that the power of appointment of District Judges under Art. 233(1) is an executive function and the Governor is bound to act on the advice of the Council of Ministers under Art. 163(1). It was also pleaded that it was not open to the High-Court to scrutinise the reasons which impelled the Council of Minis- ters to review its earlier decision taken on January 30, 1985 and decide in the subsequent meeting held on February 28, 1985 not to appoint anyone as a District Judge under Art. 233(1) from the panel of names submitted by the High Court.

It was averred that there were good and weighty reasons why the State Government were constrained to review their earlier decision. The State Government was faced with a serious problem in that there would be non-representation of 'Latin-Catholics and Anglo-Indians', 'Other Backward Class- es' and 'Scheduled Castes and Scheduled Tribes' if the appointments were to be made according to the panel submit- ted by the High Court. It was asserted that the Government viewed with concern the proceedings before the High Court and felt that there should be no room for such challenge. The Government therefore decided to reject the panel of names forwarded by the High Court by cancelling the afore- said notification and all the steps taken pursuant thereto. It was further decided to issue a fresh notification invit- ing applications from the members of the bar for appointment as District Judges for being placed before the High Court to prepare a fresh panel of names. In essence, the contention is that the State Government has the final voice in the appointment of District Judges under Art. 233(1) and it was therefore for the Council of Ministers to take the decision not to appoint anyone from the panel of names submitted by the High Court which was a decision taken in the larger public interest. The material portion of the return in the form of a counter-affidavit by the Commissioner and Secre- tary to the State Government, Home Department reads as follows:

"The Government reviewed their recommendation on 28.2.1985 and decided not to appoint anybody as recommended earlier, and further decided to invite fresh applications for being placed before the High Court to prepare a fresh panel for recruitment to the post of District Judges. The non-repre- sentation of Scheduled Castes, Latin-Catholics, Anglo- Indians and Other Backward Communities in the panel of names submitted by the High Court weighed with the Government in taking the above decision. Further it is not healthy to give room for such challenges as those made before this Hon'ble Court on the panel by interested parties. Hence the decision was taken reviewing the earlier recommendation. Fresh applications will be invited and the High Court will be requested to recommend fresh panel for recruitment to the post of District Judges."

In order to appreciate the.contentions advanced, it is necessary to mention that r. 2(b) of the Kerala S,ate Higher Judicial Service Rules, 1961 framed under the proviso to Art. 309 of the Constitution provides that one-third of the permanent places of District Judges shall be filled or reserved to be filled by direct recruitment from the bar. Note beneath r. 2(b) enjoins that in the case of appointment by direct recruitment, the appointment shall be made in accordance with the principles of reservation of posts, embodied in rr. 14 to 17 of part II of the Kerala State & Subordinate Services Rules, 1958.

For the sake of completeness, we would also refer to the scheme of communal reservation by a system of rotation or sub-rotation engrafted in rr. 14 to 17 of the Kerala State & Subordinate Services Rules, 1958. These are special provi- sions made by the State under Art. 14 read with Art. 16(4) of the Constitution for the reservation of appointments or posts in favour of.the backward classes which, in the opin- ion of the State, are not adequately represented in the services under the State. These rules are meant to ensure fair repre- sentation to the Higher judicial service of the State, to the members of the Scheduled Castes and Scheduled Tribes and to the Other Backward Classes. R. 14 insofar as material, reads:

"14. Reservation of appointments: Where the special rules lay down that the principle of reservation of appointments shall apply to any service, class or category or where in the case of any service, class or category for which no special rules have been issued, the Government have by notification in the Gazette declared that the principle of reservation of appointments shall apply to such service, class or category, appointments by direct recruitment to such service, class or category shall be made on the follow- ing basis:--

(a) The unit of appointment for the purpose of this rule shall be 20, of which two shall be reserved for Scheduled Castes and Scheduled Tribes and 8 shall be reserved for the Other Backward Classes and the remaining 10 shall be filled on the basis of merit.

(b) The claims of members of Scheduled Castes and Scheduled Tribes and Other Backward Classes shall also be considered for the appointments which shall be filled on the basis of merit and where a candidate belonging to a Scheduled Caste, Scheduled Tribe or Other Backward Class is selected on, the basis of merits, the number of posts reserved for Scheduled Castes, Scheduled Tribes or for Other Backward Classes as the case may be, shall not in any way be affected.

(c) Appointments under this rule shall be made in the order or rotation specified below in every cycle of 20 vacancies.

1. Open competition.

2. Ezhavas, Thiyyas and Billavas.

3. Open competition.

4. Scheduled Castes.

5. Open competition.

6. Muslims.

7. Open competition.

8. Latin-Catholics and Anglo-Indians.

9. Open competition.

10. Other Backward Classes.

11. Open competition.

12. Scheduled Castes.

13. Open competition.

14. Ezhavas, Thiyyas and Billaras.

15. Open competition.

16. Muslims.

17. Open competition.

18. EZhavas, Thiyyas and Billavas.

19. Open competition.

20. Viswakarmas."

Under r. 14(a) there is 50% reservation of posts for the backward classes under Art. 16(4) i.e. for the Scheduled Castes and Scheduled Tribes and Other Backward Classes. Whichever be the method adopted for selecting candidates as per the rules of rotation under r. 14(c) or sub-rotation under r. 17(2), the mandate of r. 14(b) is clear and specif- ic. The members of Scheduled Castes and Scheduled Tribes and Other Backward Classes have the right to be considered for appointments which shall be filled on the basis of merit. Where a candidate belonging to such Backward Classes is selected on the basis of merits, such selection would not prejudice their claim to the legitimate quota on the basis of reservation.

It is not often that there is no eligible candidate available from a community or group of communities. To meet such a situation, r. 15(a) provides that if a suitable candidate is not available for selection from any particular community or group of communities specified in the annexure, the said community or group shall be passed over and the post filled by a suitable candidate from the community or group of communities immediately next to the passed over community or group in the order of rotation. R. 15(b) en- joins that if a suitable candidate is not available for selection from the group of communities classified as 'Scheduled Castes', in the turn allotted for such a group in the annexure, the said group shall be passed over and the post shall be filled by a suitable candidate from the group of communities classified as 'Scheduled Tribes' and vice-versa. If no suitable candidate for selec- tion in any of the two groups viz. Scheduled Castes and Scheduled Tribes is available, the vacancy has to be filled by open competition. R. 15(c) provides for restoration of the benefit of the turn forfeited at the earliest opportuni- ty. Proviso thereto however enjoins that the restoration of the benefit of the turn forfeited by the carry-forward rule, shall not exceed 50% of the vacancies to be filled in a particular year. R. 16 provides for sub-rotation among major groups of other backward classes. R. 17(1) lays down the manner in which appointments have to be made from candidates belonging to other backward classes. Other backward classes are enumerated in List III to Part I of the Rules and there are 73 communities or groups divided into 8 categories specified in r. 17(1). Categories 1 to 7 are Ezhavas and Thiyyas, Muslims, Latin-Catholics and Anglo-Indians, Nadars, Scheduled Castes converts to Christianity, Viswakarmas and Dhooravas. All other backward

classes put together consti- tute the 8th category. R. 17(2) provides for sub-rotation among the other backward classes. We need not go into de- tails of the 40 turns in which the positions reserved for other backward classes have to be distributed. It is common ground that the five vacancies to be filled in this case had to start with the 8th turn in the cycle of rotation, in the following order: (1) Latin-Catholics and Anglo-Indians (2) Open competition (3) Other backward class- es i.e. other than those mentioned in items 1 to 7 of r. 17'(1)(4) Open competition, and (5) Scheduled Castes and Scheduled Tribes, appropriate to 8th, 10th and 12th tums in the cycle of rotation. That is because in the previous recruitment made in the year 1978, appointments had been made upto the 7th turn in the cycle of rotation. In allowing the writ petitions the learned Judges held that although they could not subject the deliberations of the Council of Ministers to judicial review and Art. 163(3) of the Constitution precludes an inquiry as to the nature of the advice given by the Council of Ministers to the Gover- nor, still there was need for affirmative action by the issue of a writ in the nature of mandamus or in the words of the High Court, there has been 'flagrant and wrongful refus- al' on the part of the State Government to exercise juris- diction. It held relying on the celebrated decision in Padfield v. Minister of Agriculture, Fisheries and Food, LR [1968] AC 997 and the several decisions of this Court and the House of Lords that although the Governor i.e. the State Government was not bound to accept the recommenda- tions of the High Court nor was he bound to give reasons for-not accepting the names recommended by the High Court, nevertheless the Council of Ministers could not unilaterally reject the panel submitted by the High Court without obtain- ing the views of the High Court. Consultation with the High Court was not an empty formality. It held that there was no full and effective consultation with the High Court before the State Government decided not to appoint anybody as a District Judge from the panel forwarded by the High Court under Art. 233(1). The reasons given by the Chief Minister for rejection of the panel of names recommended by the High Court viz. non-representation of Latin-Catholics and Anglo- Indians, Scheduled Castes and Scheduled Tribes and Other Backward Classes were'no reasons at all' and in any event the reasons were bad in law. It held that a process of recruitment cannot be abandoned nor a rank list cancelled merely because the Government felt that a suitable candidate was not available. The State Government as the appointment authority was as such bound by r. 15(a) which incorporated the rule of passing over like any other rules. Abandonment of a scheme of recruitment and the cancellation of the panel submitted by the High Court is therefore foreign to and not contemplated by the scheme if a suitable candidate is not available from a particular community or group of communi- ties. R. 15(a) merely contemplates that such community or group of communities should be passed over and the vacancy filled by a suitable candidate from the group or a community immediately next following. The High Court also adverted to the scheme of restoration which contemplated the restoration of the turn forfeited. It then went on to say that the State Government had no power to keep one vacancy open presumably to fill up that post by a suitable candidate from the group of LatinCatholics and Anglo-Indians. The governmental action was wholly mala fide, arbitrary and irrational. If it had no power to keep one post vacant for a particular community, the Government could not decide' to appoint respondents Nos. 3-6 as District Judges as recommended by the High Court. The Government refused to appoint respondent no. 1 on the pre- text that it had decided to keep one post vacant i.e. 8th turn in the cycle of rotation. If that be so, it could not have decided to appoint respondents nos. 4 and 6, Muslim and Viswakarma, 16th and 20th turns in the cycle of rotation. The first decision of the Council of Ministers taken on January 30, 1985 was therefore influenced by extraneous considerations which it ought not to have taken into account and therefore

it was liable to be struck down. The subse- quent decision ' of the Council of Ministers taken on February 28, 1985 was also guided by considerations which were wholly extraneous and irrelevant. The High Court observed that by deciding not to appoint anybody as a District Judge from the panel of names recommended by the High Court under Art. 233 (1) of the Constitution, there was an overt attempt on the part of the Government to appoint persons from outside the panel which was constitutionally impermissible. A few more facts. On April 29, 1985 i.e. the day on which the writ petitions of the present respondents were allowed by the common judgment under appeal, the High Court by a separate judgment dismissed the writ petition filed by Ms. Mary Teresa Dias, the LatinCatholic candidate, on the ground inter-alia that she was 'ineligible for selection' as a District Judge in view of the criterion laid down in r. 3(2)(c) of the Kerala State Higher Judicial Service Rules, 1961. On the same day i.e. on April 29, 1985 the learned Judges also rejected the appeal of Smt. N. Subhadra Aroma and the writ petition of K. Sadanandan. Smt. N. Subhadra Amma claimed that by reason of her marriage to a scheduled caste, she should have been regarded as such and considered to fill up the post reserved for scheduled caste candidates. In his writ petition K. Sadanandan, a scheduled caste candi- date, questioned the method of selection adopted by the High Court by interview. Both Smt. N. Subhadra Amma and K. Sada- nandan preferred appeals to this Court by special leave. In N. Subhadra Arama v. State of Kerala & Ors., (C. A. No. 4 163/85 decided on September 10, 1985) this Court allowed the appeal of N. Subhadra Amma, set aside the judgment of the High Court and directed the High Court to determine whether she belonged to a scheduled caste or not, and in case she happened to be a scheduled caste, her claim for appointment to the post reserved for scheduled caste candidates be considered. Similarly, in K. Sadanandan v. State of Kerala & Ors., (C.A. No. 5693/85 decided on December 17, 1985) this Court allowed the appeal of K. Sadanandan set aside the judgment of the High Court and directed that his claim for selection against the reserved post for scheduled caste candidates be considered afresh. The directions issued by this Court in N. Subhadra Amma's and K. Sadanandan's cases directing the High Court to consider their names for ap- pointment to the post reserved for members of the scheduled castes must necessarily disturb the panel drawn up by the High Court. In view of the directions issued by this Court which have to be obeyed by the High Court, the entire ques- tion has to be considered afresh in the light of the subse- quent developments.

Various contentions have been advanced by learned coun- sel for the parties but on the view that we take it is not necessary to deal with them all. We are grateful to the learned counsel for placing with great perspicuity, much learning and resource their respective points of view. They have mainly referred to the four decisions in Chandra Mohan v. State of U.P. & Ors., [1967] 1 SCR 77,. A. Panduranga Rao v. State of Andhra Pradesh & Ors., [1976] 1 SCR 620, Mani Subrat Jain v. State of Haryana & Ors., [1977] 2 SCR 361 and M.M. Gupta & Ors. v. State of Jammu & Kashmir & Ors., [1983] 1 SCR 593.

After the conclusion of the heating, the State Govern- ment on our request placed a copy of the letter of the Acting Chief Justice dated June 14, 1984 addressed to the Chief Minister, which was not on record. In the letter he stated that he was enclosing a panel of 14 names considered suitable by the High Court for appointment of District Judges direct from the bar. In para 7 thereof, he explained the basis on which the panel of names was prepared, namely: "In the panel of names enclosed, there is no candidate from. the 'Latin-Catholics and Anglo-Indians' group and so the first vacancy will

have to be allotted, under rule 15(a) of the Kerala State and Subordinate Services Rules, 1958, to 'Other Backward Classes' in the 10th cycle of rotation taking into account the Explanation to the annexure. The panel includes two candidates belonging to 'Other Backward Classes' namely, Shri Rajappan Asari who is a Viswakarma and Smt. K.J. Teresa who is a Scheduled Caste convert. But these two communities are not included in item 8 in rule 17(1) of the Rules. There is also no Scheduled Caste candidates. Under rule 15, therefore, we have to go down in the cycle of rotation and allot the vacancy to a candidate from the group 'Ezhavas, Thiyyas and Billavas'. The second vacancy has to be filled up on the basis of 'Open Competition'. The third vacancy should go to 'Other Backward Classes' as defined in the Explanation. As there is no O.B.C. candidate and no Scheduled Caste candidate appropriate to the 12th rotation in the annexure, and the Ezhava candidate appropriate to the 14th rotation is already approved for, this third reserved vacancy has to be filled up from among 'Muslims' (16th rotation)."

In these appeals, three main questions arise for deter- mination, namely: (i) Whether the High Court'was justified in holding that the Council of Ministers could not have at the subsequent meeting held on February 28, 1985 'reviewed' the situation and decided not to make the appointments contrary to the earlier decision taken at the Cabinet meeting held on January 30, 1985 to make such appointments on the recommendation of the High Court. (ii) Whether the High Court could have issue a writ or direction in the nature of mandamus under Art. 226 directing the State Government, meaning the Governor, to appoint respondents Nos. 1 and 3-6 as District Judges from the bar under Art. 233(1) of the Constitution in accordance with the recommendation of the High Court, and contrary to the decision of the Council of Ministers taken on February 28, 1985 not to appoint anybody from the panel forwarded by the High Court. (iii) If the High Court were of the view that there was no full and effective consultation by the State Government with the High Court as enjoined by Art. 233(1) of the Constitution and therefore the Government could not have unilaterally rejected the panel of names recommended by the High Court, whether the proper course for the High Court was to have issued a writ or direction in the nature of mandamus requiring the State Government to convey its views to the High Court as reflected in. the Chief Minister's letter dated March 4, 1985 and, if necessary. make a fresh effort to find suitable candidates from the communities or groups of communities passed over. 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 Art. 233(1) of the Constitution must be real. full and effective. To make the consultation effective. there has to be an inter-change 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 Dis- trict Judge by direct recruitment from the bar or by promo- tion from the judicial services under Art. 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.

Indubitably. the power of appointment of persons to be District Judges conferred on the Governor. meaning the State Government.

under Art. 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 Mobart v. State of U.P. & Ors., to M.M. Gupta & Ors. etc. etc. v. State of Jammu & Kashmir & Ors., (supra) 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 Art. 233(1) in the matter of appointment of District Judges is conditioned by co-

nsultation with the exercise of the power that the power can only be exercised in consultation with the High Court. Appointment of persons to be, and the posting and promo- tion of, District Judges in any State, shall be made by the Governor of the State under Art. 233(1) in consultation with the High Court exercising jurisdiction in relation to such State. Sub-Art. (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 appoint- ment. It is therefore obvious that eligibility of appoint- ment 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. & Ors., (supra) has 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 Art. 233(1) must not be empty formality but real, full and effective.

In Chandra Mohan v. State of U.P. & Ors., ,(supra) Subba Rao CJ. speaking for a unanimous court observed:

> "The exercise of the power of appointment by the Governor is conditioned by his consulta- tion 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.
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> 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 & Ors., [1970] 2 SCR 666, High Court of Punjab & Haryana etc. v. Sate of Haryana, [1975] 3 SCR 368, A. Panduranga Rao v. State of Andhra Pradesh & Ors. and M.M. Gupta & Ors. v. State of Jammu &

Kashmir & Ors., (supra).

In A. Panduranga Rao v. State of Andhra Pradesh & Ors., (supra) it was observed:

> "Government was not bound to accept all the recommendations but could tell the High Court its reasons for not accepting the High Court's recommendations in regard to certain persons. If the High Court agreed with the reasons in case of a particular person the recommendation in his case stood withdrawn and there was no question of appointing him. Even if the High Court did not agree the final authority was the Government in the matter of appointment and for good reasons it could reject the High Court's recommendations. In either event it could ask the High Court to make more recom- mendations in place of those who have been rejected."

In M.M. Gupta & Ors. v. State of Jammu & Kashmir & Ors., (supra) Amarendra Nath Sen, J. speaking for himseft and Bhagwati & Pathak, JJ. while dealing with the appointment of persons to be District Judges by the Governor under Art. 233(1), viewed with concern the recent trend of interference in the matter of judicial appointments by the Executive both at the Centre and the State levels and expressed the view that healthy conventions and proper norms should be evolved in the matter of these appointments for safe-guarding the independence of the judiciary in conformity with the re- quirements of the Constitution. We fully endorse the princi- ple deduced by him from the . various authorities of this Court in these words:

> "Normally, as a matter of rule, the recommen- dations made by the High Court for the ap- pointment of a District Judge should be ac- cepted by the State Government and the Gover-
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> nor should act on the same. If in any particu- lar case, the State Government for good and weighty reasons finds 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 con- vinced that there are good and weighty 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."

(Emphasis supplied) The Constitution of India provides in Arts. 124(2), 217(1) and 233(1) dealing with appointment of Judges from the Supreme Court downwards and Art. 222(1) dealing with transfer of a Judge from one High Court to another for a very delicate process of consultation between the executive and the judiciary. The word 'consultation' in Art. 233(1) must bear the same meaning as in these other provisions. The plain meaning of the word 'consult' as given in Shorter Oxford English Dictionary, Vol. 1 at p. 409 is: 'to take counsel together, deliberate, confer, and the word 'consul- tation' means:'the action of consulting or taking counsel together; deliberation, conference. The word 'consultation' therefore implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at

least, a satisfac- tory solution. In the words of Subba Rao, CJ. R. Pushpam v. State of Madras, AIR 1953 Mad. 392 cited by Chandrachud, J. in Shethi's case:

> "In order that the two minds may be able to confer and produce a mutual impact, it is essential that each must have for its consid- eration full and identical facts, which can at once constitute both the source and foundation of the final decision."

The concept of consultation in Art. 222(1) has been deline- ated by Chandrachud, J. in Union of India v. Sankalchand Himatlal Sheth & Anr., [1977] 4 SCC 193, in his own illumi- nating language:

> "It casts an absolute obligation on the Presi- dent to consult the Chief Justice of India before transferring a Judge from one High Court to another. The word 'may' in Article 222(1) qualifies the last clause which refers to the transfer of a Judge and not the inter- vening clause which refers to consultation with the Chief Justice of India. The President may or may not transfer a Judge from one High Court to another. He is not compelled to do so. But if he proposes to transfer a Judge. he must consult the Chief Justice of India before transferring the Judge. That is in the nature of a condition precedent to the actual trans- fer of the Judge. In other words, the transfer of a High Court Judge to another High Court cannot become effective unless the Chief Justice of India is consulted by the President in behalf of the proposed transfer. Indeed, it is euphemistic to talk in terms of effective- ness, because the transfer of a High Court Judge to another High Court is unconstitution- al unless, before transferring the Judge, the President consults the Chief Justice of India.
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> (T)here can be no purposeful consideration of a matter, in the absence of facts and circum- stances on the basis of which alone the nature of the problem involved can be appreciated and the right decision taken. It must, therefore, follow that while consulting the Chief Jus- tice, the President must make the relevant data available to him on the basis of which he can offer to the President the benefit of his considered opinion. If the facts necessary to arrive at a proper conclusion are not made available to the Chief Justice, he must ask for them because, in casting on the President the obligation to consult the Chief Justice, the Constitution at the same time must be taken to have imposed a duty on the Chief Justice to express his opinion on nothing less than a full consideration of the matter on which he is entitled to be consulted. The fulfilment by the President, of his constitu- tional obligation to place full facts before the Chief Justice and the performance by the latter, of the duty to elicit facts which are necessary to arrive at a proper conclusion are parts of the same process and are complemen- tary to each other. The faithful observance of these may well earn a handsome dividend useful to the administration of justice. Consultation within the meaning of Article 222(1), there- fore, means full and effective, not formal or unproductive consultation.

... Thus, deliberation is the quintessence of consultation."

(Emphasis supplied) The argument of Sri G. Viswanatha Iyer, learned counsel appearing for the State Government is that the High Court had no authority or jurisdiction to issue a writ of mandamus ordaining the State Government, meaning the Governor, to appoint respondents Nos. 1 and 3-6 as District Judges under Art. 233(1) in accordance with the recommendation of the High Court, and contrary to the decision of the Council of Ministers taken on February 28, 1985. He argues that the High Court exceeded its jurisdiction in subjecting the process of decision-making by the Council of Ministers to judicial review and questions the propriety of the observa- tions made by the High Court that the reasons furnished in the letter of the Chief Minister dated March 4, 1985 were no reasons at all and that the governmental action was totally arbitrary, irrational and improper. He next argues that the appointment of District Judges by the Governor in consulta- tion with the High Court under Art. 233(1) is purely an executive function and that the Governor is not bound to accept the advice of the High Court. In support of the contention, reliance is placed on the decision of this Court in Mani Subrat Jain v. State of Haryana & Ors., (supra). In any event, no writ of mandamus lies in the case of non- selection to a post. According to the learned counsel, it was open to the Government not to make any appointments at all from the panel of names forwarded by the High Court if the Government was of the opinion that the making of such appointments would result in non-representation of certain backward communities or groups. It is said that while ad- judging the suitability of candidates was no doubt a func- tion of the High Court but. at the same time, the Government had the duty to ensure that the appointment of District Judges from the bar under Art. 233(1) in accordance with the panel prepared by the High Court, was in conformity with r. 2(b) of the Kerala State Higher Judicial Service Rules i.e. in consonance with the scheme of communal reservation. In substance, the contention is that the scheme of communal reservation as laid down in rr. 14 to 17 of the Rules does not compel the State Government to pass over candidates belonging to a community or group of communities by taking recourse to the principle of passing over in r. 15(a). Finally, the learned counsel submits that if it were to be held that there was no full and effective consultation with the High Court and therefore the State Government could not have unilaterally rejected the panel, the proper course for the High Court was to have issued a writ in the nature of mandamus requiting the State Govern-

ment to communicate its views to the High Court with a view to elicit its opinion and, if necessary, make a fresh effort to find suitable candidates from the communities or groups passed over before taking a final decision in the matter. There is, in our opinion, sufficient force in these submis- sions.

Arguments of Sri T.S.Krishnamoorthy Iyer, learned coun- sel appearing for respondents nos. 3-6 were two-fold. His main submission is that according to the decision of this Court in Shamsher Singh & Anr. v. State of Punjab, [1975] 1 SCR 8 14 the Governor must act on the advice of the Council of Ministers. According to him, there was no occasion for the Council of Ministers to have reviewed the situation and decided not to appoint anybody from the panel contrary to the decision taken on January 30, 1985, which was constitu- tionally impermissible. As the sequence of events would show the immediate provocation for the subsequent decision of the Cabinet taken on February 28, 1985 was the issue of an ad- interim prohibitory order by the High Court on February 21, 1985 .restraining the State Government from making any appointments for a period of one

month. In fact, there was no legal impediment to the appointment of respondents nos. 3-6 as District Judges after the Council of Ministers had taken a decision at its meeting held on January 30, 1985 to appoint them as District Judges on the recommendation of the High Court. From the news item of the press conference held by the Chief Minister on January 31, 1985 as 'reported in the Mathrubhoomy and other Malyalam newspapers, it was amply clear that the Government had decided to fill up four posts and keep one vacancy open presumably for the Latin-Catholic candidate since she had filed a writ petition in the High Court. It is submitted that all the formalities were com- plete and the only thing that remained was the issue of a formal notification in the name of the Governor making the appointments, as required by Art. 166(1). Alternatively, the learned counsel contends that if the Government felt that there were unsurmountable difficulties in making the ap- pointments according to the panel drawn up by the High Court due to non-representation of Latin-Catholics and AngloIndi- ans, Other Backward Classes and Scheduled Castes and Sched- uled Tribes as expressed by the Chief Minister in his letter dated March 4, 1985, and as reiterated in the return filed in the High Court by the Secretary to the Government, Home Department, the State Government should have referred back the matter to the High Court requiring the High Court to reconsider the question of selection of candidates. In essence, the contention is that the subsequent decision of the Council of Ministers taken on February 28, 1985 was liable to be quashed for want of consultation with the High Court as required by Art. 233(1), and the learned counsel suggest- ed that we should remit back the matter to the State Govern- ment with necessary directions. As to the power of the High Court to grant a writ in the nature of mandamus, he contends that respondents nos..3-6 having been recommended by the High Court had a legitimate expectation to be appointed as District Judges from the bar under Art. 233(1) and therefore had the fight to approach the High Court for grant of neces- sary relief.

Argument of Sri Subramanion Poti, learned counsel ap- pearing for respondent no. 1 was that the reasons furnished by the Chief Minister in his letter dated March 4, 1985 were no reasons at all and that the reason viz non-representation of Latin-Catholics and Anglo-Indians, Other Backward Classes and Scheduled Castes and Scheduled Tribes, could not be a ground for rejection of the panel forwarded by the High Court or furnish a basis to issue a fresh notification inviting applications. He submits that r. 15(a) contemplates that if a suitable candidate was not available. the vacancy should be filled by a candidate belonging to the community or group immediately next to the passed over community or group. The learned counsel contends that it was not suggest- ed that the panel of names drawn up by the High Court was not in conformity with the rules of communal reservation laid down in rr. 14 to 17 6f the Rules. If no candidates were available from the communities Latin-Catholics and Anglo-Indians. Other Backward Classes and Scheduled Castes and Scheduled Tribes, 8th,10th and 12 turns in the cycle of rotation. the vacancy had to be filled up by respondent No. 1 Smt. A. Lakshmikutty, an Ezhava community candidate, 14th in the cycle of rotation. According to him-, there were no 'good and weighty reasons' for the Council of MiniSters in withholding from the Governor the recommendation made by the High Court which was plainly for a bad reason. While the Council of Ministers had the duty to advise the Governor in the affairs of the State, it could not withhold information from the Governor. Alternatively, he adopted the argument of Sri T.S. Krishnamoorthy Iyer and contended that if it be held that there was no full .and effective consultation between the High Court and the State Government. the matter be remitted back to the State Government for reconsideration of the whole question.

We find it difficult to sustain the judgment of the High Court or the reasons upon which it is based. The High Court if we may say so without meaning any disrespect, fell into an error in characterising the reasons given on the basis of which the Council of Ministers reached a decision on February 28, 1985 to review their earlier decision taken on January 30, 1985 and decided not to appoint anybody as a District Judge from the panel of names forwarded by the High Court which were 'arbitrary, illegal and improper'. Apparently, the High Court was not right in its view that the rejection of the panel for the reason disclosed by the Council of Ministers in his letter dated March 4, 1985 viz. due to non-representation of candi- dates belonging to Latin-Catholics & Anglo-Indians, Other Backward Classes and Scheduled Castes and Scheduled Tribes, 8th, 10th and 12th turns in the cycle of rotation, was 'no reason at all'. We are satisfied that the High Court could not have upon this basis issued a writ of mandamus directing the State Government i.e. the Governor to appoint respond- ents Nos. 1 and 3-6 as District Judges under Art. 233(1) of the Constitution. The High Court has virtually tendered on advice to the Governor to act on the recommendation of the High Court i.e. contrary to the advice of the Council of Ministers and thereby entered into the process of decision-making which was constitutionally impermissible. The Governor has to act on the advice of the Council of Ministers under Art. 163(1) in the matter of appointment of District Judges under Art. 233(1) and not on the advice of the High Court: Shamsher Singh & Anr. v. State of Punjab, (supra). Appointment of persons to be, and posting and promotion of, District Judges by the Governor under Art. 233(1) is purely an executive function. The High Court therefore had no authority or jurisdiction to issue any writ of mandamus of the kind complained of. If was certainly not open to the High Court to embark upon an inquiry as to the reasons which impelled the Council of Ministers at the meeting held on February 28, 1985 to review the decision taken on January 30, 1985 and decide not to appoint anyone as a District Judge under Art. 233(1) from the panel of names drawn up by the High Court. It was also not justified in observing that the reasons as disclosed by the Chief Minister in his letter dated March 4, 1985, on the basis of which the Council of Ministers on February 28, 1985 decided not to appoint respondents Nos. 1 and 3-6 as District Judges on the recommendation of the High Court viz. due to non- representation of certain important communities or groups of communities, were no reasons at all and in any event, the reasons given were bad in law. There is no basis, in our opinion, for the finding reached by the High Court. Learned counsel for the State Government rightly questioned the authority and jurisdiction of the High Court to have issued a writ of mandamus commanding the State Government to make certain appointment of persons to be District Judges when the Council of Ministers had taken a decision to the contrary. According to him, this was not a proper exercise of powers by the High Court under Art. 226 of the Constitution and in any view of the matter, the issuance of a writ of mandamus in the circumstances was wholly impermissible. In our opin- ion, the contention must prevail.

We must refer to the case of Mani Subrat Jain v. State of Haryana & Ors., (supra) which was relied upon by learned counsel for the State Government. It is well-settled that a writ of mandamus is not a writ of course or a writ of right, but is, as a rule, discretionary. There must be a judicially enforceable right for the enforcement of which a mandamus will lie. The legal right to enforce the performance of a duty must be in the applicant himself. In general, there- fore, the Court will only enforce the performance of statu- tory duties by public bodies on application of a person who can show that he has himself a legal right to insist on such performance. Applying the principles stated in Halsbury's Laws of England, 4th edn., vol. 1, paragarph 122, this Court observed that a person whose name had

been recommended for appointment as a District Judge by the High Court under Art. 233(1) had no legal right to the post, nor was the Governor bound to act on the advice of the High Court and therefore he could not ask for a mandamus. It was observed:

> "It is elementary though it is to be restated that no one can ask for a mandamus without a legal right.
>
> The initial appointment of District Judges under Article 233 is within the exclusive jurisdiction of the Government after consulta- tion with the High Court. The Governor is not bound to act on the advice of the High Court. The High Court recommends the names of persons for appointment. If the names are recommended by the High Court it is not obligatory on the Governor to accept the recommendation. (T)he consultation of the Governor with the High Court does not mean that the Governor must accept whatever advice of recommendation is given by the High Court. Article 233 re- quires that the Governor should obtain from the High Court its views on the merits and demerits of persons selected'for promotion and direct recruitment."

The existence of a right is the foundation of the jurisdic- tion of a Court to issue a writ of mandamus. The present trend of judicial opinion appears to be that in the case of non-selection to a post, no writ of mandamus lies. We howev- er do not wish to rest the decision on the technical ground. In our considered opinion, the decision of these appeals must ultimately turn on the question whether there was real, full and effective consultation by the Governor with the High Court within the meaning of Art. 233(1) before the State Government reached a decision to reject the panel forwarded by the High Court. As well-settled, the duty of the Governor to consult the High Court in the matter of appointment of District Judges is so integrated with the exercise of his power that the power can only be exercised in the manner provided by Art. 233(1) or not at all. Normal- ly, as a matter of rule, the recommendations of the High Court for the appointment of a District Judge should be accepted by the State Government and the Governor should act on the same. If, in any particular case, the State Govern- ment for 'good and weighty reasons' finds it difficult to accept the recommendations of the High Court, the State Government should communicate its views to the High Court and must have complete and effective consultation with the High Court in the matter. It must therefore follow that before rejecting the panel forwarded by the High Court, the State Government should have conveyed its views to the High Court to elicit its opinion, It should have taken the High Court into confidence and placed before it-the difficulties that faced the Government in acting upon the recommenda- tions, namely, that it would result in non-representation of important communities like Latin-Catholics and Anglo-Indi- ans, Other Backward Classes and Scheduled Castes and Sched- uled Tribes, as expressed by the Chief Minister in his letter dated March 4, 1985. The fulfilment by the Governor of his constitutional obligation to place full facts before the High Court was a precondition before the State Govern- ment could arrive at a decision not, to appoint respondents nos. 1 and .3-6 as District Judges. On its part, there was a constitutional obligation cast on the High Court under Art. 233(1) to express its opinion on a consideration of the facts and circumstances on the basis of which alone the nature of the problem could be appreciated and the .right decision taken. It must accordingly be held that the State Government was wrong in taking a unilateral

decision to cancel all steps taken in pursuance of the notification dated September 24, 1983 and to issue a fresh notification inviting applica-

tions, without taking the High Court into confidence. In the premises, the proper course for the High Court to adopt was to have issued a writ in the nature of mandamus requiring the State Government to place before the High Court the facts i.e. the difficulties as expressed in the letter of the Chief Minister dated March 4, 1985 to elicit its opin- ion.

If the matter rested at that, there would be no diffi- culty, but the High Court has gone a step further. The issuance of a writ of mandamus by the High Court directing the State Government i.e. the Governor to act on the recom- mendation of the High Court to fill up the five vacancies in the posts of District Judges meant for direct recruitment from the members of the bar under Art. 233(1) was constitu- tionally impermissible. Although the High Court was not oblivious that the 'advice' of the Council of Ministers to reject the panel of fourteen names submitted by the High Court could not be subject to judicial review and that Art. 163(1) of the Constitution precludes an inquiry as to the nature of the advice given by the Council of Ministers to the Governor, still it has issued a writ in the nature of mandamus upon the basis that it is called upon to adjudge the legality and propriety of the two decisions taken by the State Government through the instrumentality of the Council of Ministers. Relying upon the decision of this Court in the State of Rajasthan & Ors. v. Union of India, [1978] 1 SCR 1, it observed that so long as the question remains whether the Council of Ministers acted within the limits of their power or exceeded it, it can be decided by the Court. Apart from saying that the reasons given on the basis of which the Council of Ministers on February 28, 1985 reviewed their earlier decision of January 30, 1985 and decided not to appoint respondents nos. 1 and 3-6 as District Judges on the recommendation of the High Court viz. due to non-representation of candidates belonging to Latin-Catholics and Anglo- Indians, Other Backward Classes and Scheduled Castes and Scheduled Tribes, were no reasons at all, and that the action of 'the State Government in rejecting the panel sent by the High Court was totally arbitrary, illegal and improper, it further observed that 'there was an overt attempt on the part of the State Government to appoint persons from outside the panel' which was constitutionally impermissible, and relied on the proposition laid down in Padfied's case that 'if the Minister gave no reasons, the Court might infer that he had no good reasons to give'. It accordingly held that the action of the State Government had no rational nexus to the object sought to be achieved i.e. implementa- tion of the scheme of communal reservation laid down in rr. 14 to 17 of the Kerala State & Subordinate Services Rules made applicable by Note beneath r. 2(b) of the Kerala State Higher Judicial Service Rules.

In coming to that conclusion, the High Court relied upon the following observations of Bhagwati, J. in the State of Rajasthan & Ors. v. Union of India, (supra) to the effect:

> "It will, therefore, be seen that merely because a question has a political colour, the Court cannot fold its hands in despair and declare "Judicial hands off". So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so ..... Every organ of government, be it the executive or the legislature or the judiciary, derives its authority from the

Constitution and it has to act within the limits of its authority."

FolloWing this line of reasoning, the High Court ob-

serves that 'every activity of the Government must be in- formed with reason and every action taken by the State Government must be in public interest and the action would be invalid if it is unreasonable or lacking the quality of public interest. With respect, the High Court was in error in working this principle, which on the contrary, lands support to the contention of the State Government that the High Court exceeded its jurisdiction in issuing the writ of Mandamus complained of the reason for this is obvious. Our Constitution does not envisage a rigid separation of powers. For example, the power to promulgate on Ordinance which, undisputedly, is a legislative power, is conferred on the executive under Art. 123. Even though this is so, the re- spective powers of the three wings of the State are well- defined with the object that each wing must function within the field earmarked for it. The object of such demarcation is to exclude the possibility of encroachment on the field earmarked for one wing by the other or others. As long as each wing of the State functions within the field carved out and shows due deference for the other two branches, there would arise no difficulty in the working of the Constitu- tion. But the trouble arises when one wing of the State tries to encroach on the field reserved for the other. It is in the above context that special responsibility devolves upon the Judges to avoid an over-activist approach and to ensure that they do not trespass within the spheres ear- marked for the other two branches of the State. In our opinion, the High Court could not intervene at a stage where the Council of Ministers had reviewed the situation and decided to reject the panel sent by the High Court and not to appoint any of the five advocates to be District Judges except by issuing a writ in the nature of mandamus requiting the State Government to refer back the matter to the High Court for reconsideration in the event the High Court came to the conclusion that there was no full and effective consultation, .

We find it difficult to fully subscribe to the view expressed by the High Court that the action of the State Government was not informed with reason or that it was not in public interest. It cannot be said that there was any impropriety involved in the Chief Minister writing to the Actg. Chief Justice placing the views of the Government. The High Court failed to appreciate that the Chief Minister expressed his unhappiness that due to adherence to the principle of passing over the Government was not able to implement its policy of giving adequate representation to candidates belonging to Latin-Catholics and Anglo-Indians, Other Backward Classes and Scheduled Castes and Scheduled Tribes. Further, as the vacancies that would occur for direct recruitment in the cadre of District Judges would only be few, the usual procedure of passing over communities could not be made good in the near future, and that the adoption of that course would cause neglect of very backward communities for a long time. May be, the Government thought, albeit wrongly, that the principle of passing over embodied in rule 15(a) of the Rules being an integral part of the process of appointment, the ultimate decision on the ques- tion whether recourse should be had to that principle was one for the Government to take. We are quite clear in our mind that the Government was misled on that aspect. Normally, the principle of passing over laid down in r. 15(a) of the Rules in as integral part of the process of appointment and therefore the Government being the appoint- ment authority would have the right to take a decision in the matter. But the Government failed to appreciate that the High Court plays a decisive role in the matter of appoint- ment of District Judges

under Art. 233(1). Adjudging suit- ability of a candidate for appointment as a District Judge under Art. 233(1) is a function of the High Court which must necessarily imply that if the High Court finds that the candidate belonging to a particular community or group is not suitable for appointment, it has to find a candidate from the community or group next following in the cycle of rotation- It must logically follow, as a necessary conse- quence that it is for the High Court to decide whether or not a. particular community or group should be passed over under r. 15(a) of the Rules for want of a suitable candidate and the vacancy be filled up from the community or group immediately next to the passed over community or group in the order of rotation or sub-rotation provided in r. 14(c). All that the State Government could do was to convey to the High Court the difficulties faced by the Government in implementing the recommendations. It must accordingly be held that the State Government wrongly assumed to itself the power to decide the question whether the principle of passing over laid down in r. 15(a) of the Rules should be resorted to or not. There was quite some discussion at the bar as to whether the Council of Ministers could have reviewed their earlier decision and decided not to appoint anybody from the panel of names forwarded by the High Court and to issue a fresh notification inviting applications. The answer to the ques- tion is self-evident. Merely because the Chief Minister briefed, the press on January 31, 1985 as regards the decision taken at the meeting of the Council of Ministers held on the previous day and the news of the press confer- ence was published in the Mathrubhoom and other Malyalam newspapers to the effect that the Government had decided to fill up four posts of District Judges, it could not be said that there was an order of the State Government in the manner required by Art. 166(1). What the news item conveyed was that the Council of Ministers had taken a decision to advise the Governor to appoint respondents nos. 3-6 as District Judges. The Governor has to act with the aid and advice of the Council of Ministers as required by Art. 163(1). Whatever the Council of Ministers may say in regard to a particular matter, does not become the action of the State Government till the advice of the Council of Ministers is accepted or deemed to be accepted by the Head of the State. Before an advice of the Council of Ministers amounts to an order of the State Government, there are two require- ments to be ful-filled. namely: (1) The order of the State Government had to be expressed in the name of the Governor as required by Art. 166(1). and (2) It has to be communicat- ed to the persons concerned. See: Staff of Punjab v. Sodhi Sukhdev Singh, [1961] 2 SCR 371 and Bachhittar Singh v. State of Punjab. [1962] Suppl. SCR 713. It must therefore follow that unless and until the decision taken by the Council of Ministers on January 30, 1985 was translated into action by the issue of a notification expressed in the name of the Governor as required by Art. 166(1), it could not be said to be an order of the State Government. Until then. the earlier decision of the Council of Ministers was only a tentative one and it was therefore fully competent for the High Court to reconsider the matter and come to a fresh decision.

It is said reflect that there should have been this unfortunate discord between the High Court and the State Government over the direct recruitment of District Judges from the bar under Art. 233(1). This was mainly because there was failure to appreciate on the part of both the respective functions of each. We hope and trust that the State Government and the High Court in the consultative process would come to a solution of the problem acceptable to both as early as possible.

At our request, the Registrar of the High Court has furnished us with requisite information on the strength of cadre of District Judges. From the Note prepared by him, the picture that emerges is

this. Under the proviso to r. 2(b) of the Kerala State Higher Judicial Service Rules, one-third of the permanent posts of District Judges including Selec- tion Grade District Judges has to be filled up or reserved to be filled up by direct recruitment. The number of perma- nent places of District Judges is 29. There is only one District Judge at present who is a direct recruit. The number of posts has increased with the creation of three posts of Motor Accidents Claims Tribunals at Palghat, Man- jeri and Tellichen which started functioning from June 1, 198 1, and became permanent by June 1, 1986. Thus the number of permanent posts of District Judges has gone up to 32. Therefore, there arises the need for filling up ten posts of District Judges by direct recruitment. Even after the fill- ing up of five vacancies with which we are concerned, there would still remain scope for selecting four more District Judges from the bar. With the elevation of Sri K.T. Thomas and Sri K. Sreedharan who were both directly recruited from the bar, there would be need for filling up the posts of District Judges vacated by them. Due to the constitutional impasse created, the matter is at a standstill. In the result, the appeals succeed and are allowed to the extent indicated herein. The judgment and order of the High Court directing the issuance of a writ of mandamus commanding the State Government to appoint respondents Nos. 1 and 3-6 as District Judges under Art. 233(1) of the Con- stitution are set aside. We instead direct that a writ in the nature of mandamus shall be issued to the State Govern- ment requiring it to communicate its views to the High Court to elicit its opinion within six weeks from today and, if necessary, make a fresh effort to find suitable candidates from the communities or groups of communities passed over before taking a final decision in the matter. In conse- quence, the State Government's decision not to make appoint- ments from the panel forwarded by the High Court and to re- notify the vacancies must stand quashed. The High Court shall also comply with the directions issued by this Court in two cases of Smt. N. Subhadra Arnrna and K. Sadanandan. We make it clear that the choice of candidates lies entirely with the High Court.

There shall be no order as to costs.

S.R. Appeals al- lowed.