Supreme Court of India
Union Of India (Uoi) vs Sankalchand Himatlal Sheth And ... on 19 September, 1977
Equivalent citations: AIR 1977 SC 2328, (1977) GLR 919, (1977) 0 GLR 90, 1977 LablC 1857, (1977) 4 SCC 193, 1978 1 SCR 423
Author: P Bhagwati
Bench: N Untwalia, P Bhagwati, S M Ali, V K Iyer, Y Chandrachud
JUDGMENT

1. We have heard the learned Attorney-General and Mr. Seervai fully on the various points arising in this appeal. We will deal with the arguments of the learned Counsel later by a considered judgment or judgments. For the present we will only say that since we are informed that the parties to the appeal have arrived at a settlement, the appeal shall stand disposed of in terms of that settlement. Those terms are as follows:

On the facts and circumstances on record the present government do not consider that there was any justification for transferring Justice Sheth from Gujarat High Court and propose to transfer him back to that High Court.

On this statement being made by the learned Attorney-General, Mr. Seervai Counsel for respondent No. 1 (Justice S.H. Sheth) withdraws the writ petition with leave of the Court.

The following Opinions were delivered:

Chandrachud, J. This appeal by certificate involves the question as to the constitutionality of a notification issued by the President of India on May 27, 1976 which reads thus:

In exercise of the powers conferred by Clause (1) of Article 222 of the Constitution of India, the President after consultation with the Chief Justice of India, is pleased to transfer Shri Justice Sankalchand Himatlal Sheth, Judge of the High Court of Gujarat, as Judge of the High Court of Andhra Pradesh with effect from the date he assumes charge of his office.

By a foot-note, Justice Sheth was "requested to take charge of his duties in the Andhra Pradesh High Court within four weeks from the date of issue" of the notification. The notification was issued by the Government of India in its Ministry of Law, Justice and Company Affairs, Department of Justice.

2. Mr. Sheth complied with the order of transfer and assumed charge of his office as a Judge of the Andhra Pradesh High Court but before doing so, he filed a writ petition, 911 of 1976, in the Gujarat High Court challenging the constitutional validity of the notification on the following grounds:

(i) The order was passed without his consent: such consent must be necessarily implied in Article 222(1) of the Constitution and therefore the transfer of a Judge from one High Court to another High Court without his consent is unconstitutional;

(ii) The order was passed in breach of the assurance given on behalf of the Government of India by the then Law Minister Shri A.K. Sen who, while moving the Constitution (15th Amendment) Act, 1963 said in the Lok Sabha that "so far as High Court Judges were concerned, they should not be transferred excepting by consent". Mr. Sheth having accepted judgeship of the Gujarat High Court on April 23, 1969 on the faith of the Law Minister's assurance, the Government of India was bound by that assurance on the doctrine of promissory estoppel;

(iii) The order of transfer mitigated against public interest. The power conferred by Article 222(1) was conditioned by the existence and requirement of public interest and since the impugned transfer was not shown to have been made in public interest, it was ultra vires; and

(iv) The order was passed without effective consultation with the Chief Justice of India. 'Consultation' in Article 222(1) means "effective consultation" and since the precondition of Article 222(1) that no transfer can be made without such consultation was not fulfilled, the order was bad and of no effect.

3. The Union of India was respondent 1 to the petition while Shri A.N. Ray, Chief Justice of India, or his successor-in-office was impleaded as respondent 2. The Union of India filed a counter-affidavit repudiating the factual allegations made by Mr. Sheth in his writ petition and disputing the validity of his legal contentions. The Chief Justice of India did not file any affidavit and beyond appearing through the Addl. Solicitor General, who also represented the Union Government, he took no part in the proceedings.

4. The writ petition was heard by a special Bench of three Judges, Justice J.B. Mehta, A.D. Desai and D.A. Desai. They unanimously rejected the challenge to the order of transfer on the ground of promissory estoppel. As regards the first ground, J.B. Mehta and D.A. Desai, JJ. held that the order was not void for want of Mr. Sheth's consent to his transfer. A.D. Desai J., however, took the view that the Judge of a High Court cannot be transferred without his consent. The third and fourth grounds were treated together by the learned Judges as two facets of the same contention and they held, unanimously, that there was no effective consultation with the Chief Justice of India. They arrived at this conclusion by different processes of reasoning into which it is unnecessary to go at this stage. J.B. Mehta J. voided the order of transfer on the ground that Mr. Sheth was "never consulted or informed of even the proposal of transfer as per the minimum requirement of natural justice and because it was not demonstrated. . . . by any material on record that there was effective consultation of the Chief Justice of India as required by the mandatory provision of Article 222(1)". A.D. Desai J. held that the order was unconstitutional because it was passed without Mr. Sheth's consent and secondly because it was passed "for a collateral purpose". The "discretionary power under Article 222(1)" was, according to the learned Judge, exercised "arbitrarily and unreasonably". D.A. Desai J. considered the matter by formulating these questions: "Is the power of the President under Article 222 unfettered ? What are the conditions for the exercise of such a discretionary power ? Have these conditions been fulfilled ? What is the scope and nature of consultation as envisaged by Article 222(1)?" Referring to the "mass transfers" of 16 Judges which were effected with "one stroke", though each Judge may have had peculiar personal difficulties to contend with and considering that the Union of India had failed to disclose the "nature and content of the

consultation" with the Chief Justice of India, the learned Judge concluded that the consultation was not meaningful. He set aside the order observing, that "the head of the Judiciary does not appear to have taken into consideration all the relevant data when he was consulted and therefore, it is an inescapable conclusion ...that the transfer order for want of consultation as required by the Constitution is void".

5. The High Court has granted to the Union of India a certificate under Articles 132 and 133(1) of the Constitution to appeal to this Court. The Union Government has filed this appeal on the basis of that certificate, impleading Justice S.H. Sheth as respondent 1 and the Chief Justice of India as respondent 2.

6. During the hearing of the writ petition in the High Court, the Union of India raised an objection to the three particular Judges hearing the matter on the ground of bias. That objection was overruled by the Court and fortunately, the learned Attorney-General has spared us from having to consider that untenable contention by stating that he does not want to canvas it. Since Mr. Seervai, appearing on behalf of respondent 1, has not pressed the contention as regards promissory estoppel, it is unnecessary to examine that point also.

7. Mr. Seervai put the point of consent in the forefront and wove the brunt of his argument around it. Article 222(1) of the Constitution does not speak of consent. It provides:

The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.

But the learned Counsel contends that the power conferred by the article is, by necessary implication, subject to the precondition that the Judge who is proposed to be transferred must consent to his transfer. The fundamental basis underlying this contention is that judicial independence can be undermined by vesting the power of transferring a Judge in the executive and therefore, the transfer of High Court Judges from one High Court to another without their consent is calculated to undermine the independence of the High Court Judges. In order to uphold the independence of the judiciary, which is a basic feature of the Constitution, the Court has not only the power but it is its plain duty to read into Article 222(1) a limitation which is not to be found on the face of that article. This argument is elaborated thus:

(1) The transfer of a Judge, in many a case, inflicts personal injuries on him. For example, a Judge transferred from one High Court to another may have to maintain two establishments ; if his wife or unmarried daughter is gainfully employed, she may be required to give up the employment; the education of his children may suffer ; and above all, the transfer of a permanent Judge disables him from practicing not only in the High Court to which he was initially appointed but in the High Court or High Courts to which he may be subsequently transferred. To empower the executive to inflict these injuries on a Judge would gravely undermine the independence of the judiciary because, human nature being what it is, a large number of Judges would, consciously or unconsciously, be induced to fall in line with the wishes and policies of the executive government.

(2) It would be a surprising anomaly that the transfer of subordinate judges, as decided by the Supreme Court in several cases, should be exclusively within the control of the High Court in order to ensure that those judges are immune from the exercise of improper pressures by the executive, whereas High Court Judges themselves, for whose independence the Constitution has made copious and elaborate provisions, should be left to the mercy of the executive.

(3) The requirement of Article 222(1) that the President must consult the Chief Justice of India before transferring a Judge does not answer the problem because, even though consultation with the Chief Justice is not a matter of formality, the final world, in practice, always rests with the executive.

(4) Assuming that the President's power to transfer a High Court Judge would be reduced to a dead letter that power is made to depend upon the Judge's consent, if the choice lay between depriving numerous articles of the Constitution designed to secure the independence of the judiciary of their content and, on the other hand, depriving Article 222(1) of its practical effect, the second alternative ought to and must be preferred.

(5) The oath which a Judge of the High Court has to take, as prescribed by the Third Schedule, Clause VIII of the Constitution, that he will perform the duties of of his office "without fear or favour", an expression which was absent in the form of the oath prescribed by Schedule IV to the Government of India Act, 1935, will not only become meaningless but will be impossible to fulfill unless it was placed out of the power of the legislature or the executive to secure favours from a Judge by putting him in fear of the injury which can easily be inflicted upon him by transferring him from one High Court to another.

(6) Even assuming that transfers of High Court Judges are necessary in the interests of national integration, it cannot be ignored that independence of the High Court Judges is the highest public interest, particularly in a federal or quasi-federal Constitution like ours and if there is a conflict of interest, the high principle of the independence of the judiciary must prevail over the amorphous concept of national integration.

(7) The transfer of a Judge from one High Court to another is, subject to incidents like continuity of service, in the nature of a fresh appointment to the other Court. Since a person cannot be appointed to a post without his consent, Article 222(1) should be read as if it contains the words "with his consent" after the words "transfer a Judge" and before the words "from one High Court to any other High Court". In other words, "transfer", within the meaning of Article 222(1) means a consensual, not a compulsive shifting of a Judge from one High Court to another.

(8) It is of the essence of judicial service that there is no master-and-servant relationship between a Judge and the Government. The Judge cannot be asked by the Government to decide a case in any particular way. Even the higher Court, generally only corrects the Judge of the lower court-it does not command him. Therefore, "transfer" in Article 222(1) does not have the same colour or content as in other services. The concept of 'transfer' under that article is totally different, a concept which must be construed harmoniously with the various constitutional provisions which are enacted in order to secure judicial independence. A non-consensual transfer will provide the executive with a

potent weapon to punish the Judge who does not toe its line and thereby destroy the independence of the judiciary.

(9) Of no word can one say that it is clear and unambiguous unless one reads the whole document in which that word occurs. "Transfer", in the context of the entire constitutional scheme becomes a word of doubtful import. If a vital constitutional principle is going to be violated by putting a wider construction on that expression, it must receive a narrow, restricted meaning ; and lastly, (10) Such a narrow interpretation will not deprive the article of its practical officacy or reduce it to dead letter because, as a matter of fact, nearly 25 Judges were transferred with their consent since the inception of the Constitution. It was only during the emergency, when every safeguard of liberty had gone, that mass transfer of High Court Judges were resorted to by the executive on grounds unconnected with the requirements of public interest.

8. The learned Attorney-General does not dispute that the greatest care ought to be taken to preserve the independence of the judiciary which the Constitution so copiously protects. Nor does he join issue on the question of hardship which a transfer ordinarily entails. He, however, contends that the word 'transfer which occurs in Article 222(1) is not an expression of ambiguous import, that there is no justification for reading the precondition of 'consent' in the article which is not to be found therein and that, even assuming for the purposes of argument that a Judge has to take a fresh oath before taking office in the High Court to which he is transferred, 'transfer' does not involve a fresh appointment. Therefore, it is not necessary to obtain the consent of the Judge to his transfer from one High Court to another. On the question of consultation with the Chief Justice of India, the Attorney-General did not labour at any length. Indeed, Mr. Seervai himself did not expatiate on that question. The drift of the Union's submission is that consultation with the Chief Justice can be an adequate safeguard against arbitrary transfers. We will have to consider carefully the question as to what the term 'consultation' comprehends, in order that such a safeguard may be real and effective.

9. I will deal first with Mr. Seervai's contention that on a true construction of Article 222(1) of the Constitution, a Judge of a High Court cannot be transferred without his consent. Since Article 222(1) does not provide that such consent is necessary, the argument raises the question whether one can still read into that article words which are not to be found in it. Statutory interpretation, with conflicting rules pulling in different directions, has become a murky area and just as a case-law digest can supply an authority on almost any thinkable proposition, so the new editions of old classics have collected over the years formulas which can fit in with any interpretation which one may choose to place. Perplexed by a bewildering mass of irreconcilable dogmas, courts have adopted and applied to cases which come before them rules which reflect their own value judgments, making it increasingly difficult to define with precision the extent to which one may look beyond the actual words used by the legislature, for discovering the true legislative purpose or intent. "Traditional overemphasis on the literal aspects of meaning has provoked today's reactionary under emphasis on them", says Reed Dickerson in his innovative work on "The Interpretation and Application of Statutes", but "A wholesome resistance to the excesses of literalism need not exaggerate the uncertainties of language nor distort the proper role or range of judicial discretion." (pag 4).

10. In the United States of America, Judges like George Sutherland and Hugo Black have made fervent pleas that the Court must read the constitutional clauses literally. In Home Building and Loan Association v. Blaisdell, 78 L.Ed. 413 (1934). Justice Sutherland in his dissenting opinion said that "If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned." In Griswold v. Connecticut 14 L.Ed.2d 510(1965), Justice Black, also in a dissent, said that "one of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words more or less flexible and more or less restricted in meaning." Other Judges like Benjamin Cardozo have said that one draws precise meaning from a document as vaguely worded as the Constitution only by first reading values into its clauses. And by a famous formulation, Justice Frankfurter said in Massachusetts S. Insurance Co. v. U.S. (1956) 352 U.S. 128 at 138, that "there is no surer way to misread a document than to read it literally." But this is not to be taken too literally. 'The hard truth of the matter is that American Courts have no intelligible, generally accepted and consistently applied theory of statutory interpretation."

11. The normal rule of interpretation is that the words used by the legislature are generally a safe-guide to its intention. Lord Reid in Westminster Bank Ltd. v. Zang (1966) A.C. 182, observed that "no principle of interpretation of statutes is more firmly settled than the rule that the Court must deduce the intention of Parliament from the words used in the Act." Applying such a rule, this Court observed in S. Narayanaswami v. G. Panneerselyam, that "where the statute's meaning is clear and explicit, words cannot be interpolated." What is true of the interpretation of an ordinary statute is not any the less true in the case of a constitutional provision and the same rule applies equally to both. But if the words of an instrument are ambiguous in the sense that they can reasonably bear more than one meaning, that is to say, if the words are semantically ambiguous, or if a provision, if read literally, is patently incompatible with the other provisions of that instrument, the court would be justified in construing the words in a manner which will make the particular provision purposeful. That, in essence is the rule of harmonious construction. In M. Pentiah v. Veeramallappa, this Court observed:

Where the language of a statute, in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. . . .

But, if the provision is clear and explicit, it cannot be reduced to a nullity by reading into it a meaning which it does not carry and, therefore, "Courts are very reluctant to substitute words in a statute or to add words to it and it has been said that they will only do so where there is a repugnancy to good sense."(5) In the view which I am disposed to take, it is unnecessary to dwell upon Lord Denning's edict in Seaford Court Estates Ltd. v. Asher (1949) 2 All. E.R. 155 (at p. 164), that when a defect appears in a statute, a Judge cannot simply fold his hands and blame the draftsman, that he must supplement the written word so as to give force and life to the intention of the legislature and that he should ask himself the question how, if the makers of the Act had themselves come across the particular rock in the texture of it, they would have straightened it out. 1 may only add, though even that does not apply, that Lord Denning wound up by saying, may be not

by way of recanting, that "a Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

12. The sheet anchor of Mr. Seervai's argument is that independence of the judiciary is one of the cardinal features of our Constitution, that the Constitution has made elaborate provisions to secure the freedom of the judiciary from executive interference and that, if a High Court Judge is allowed to be transferred without his consent, the independence of the judiciary will be gravely imperilled and constitutional provisions designed to protect that independence will be bended of their meaning and content. Transfer, according to the counsel, must therefore be taken to mean consensual migration, as opposed to compulsive shifting, of a Judge from one High Court to another. It is beyond question that independence of the judiciary is one of foremost concerns of our Constitution. The Constituent Assembly showed great solicitude for the attainment of that ideal, devoting more hours of debate to that subject than to any other aspect of the judicial provisions: "If the beacon of the Judiciary was to remain bright, the courts must be above reproach, free from coercion and from political influence". Participating in the debate on judicial provisions, Jawahar Lal Nehru said that is was important that the High Court Judges should not only be first-rate but should be of the highest intergrity, "people who can stand up against the executive government and whoever come in their way." Dr. Ambedkar, while winding up the debate on the judicial provisions, said that the question as regards the independence of the judiciary was "of the greatest importance" and that there could be no difference of opinion that the judiciary had to be "independent of the executive" C.A.D. Vol. 8 p. 297.

13. Having envisaged that the judiciary, which ought to act as a bastion of the rights and freedom of the people, must be immune from the influence and interference of the executive, the Constituent Assembly gave to that concept a concrete form by making various provisions to secure and safeguard the independence of the judiciary. Article 50 of the Constitution, which contains a Directive Principle of State Policy, (provides that the State shall take steps to separate the judiciary from the executive in the public services of the State. The form of oath prescribed by Clause VIII, Third Schedule of the Constitution for a Judge or a Chief Justice of the High Court requires him to affirm that he will perform the duties of his office "without fear or favour, affection or ill-will." The words "without fear or favour" were added by the Constitution to the oath prescribed for Judges and Chief Justices of High Court by the Fourth Schedule, Clause 4 of the Government of India Act, 1935. By Article 202(3)(d), expenditure in respect of the salaries and allowances of High Court Judges is charged on the Consolidated Fund of each State. The pensions payable to High Court Judges are charged on the Consolidated Fund of India under Article 112(3)(d)(iii). By virtue of Article 203(1), the salaries and allowances are not subject to the vote of the Legislative Assembly and, by virtue of Article 113(1), the pensions are not subject to the vote of the Parliament. The High Court Judges, by Article 221(1), are entitled to be paid the. salaries which are specified in the Second Schedule to the Constitution. Evidently, such salaries cannot be varied without an amendment of the Constitution. Further, under the proviso to Article 221(2), neither the allowances of the Judge nor his rights in respect of leave of absence or pension can be varied to his disadvantage after his appointment. The relevant part of Article 211 provides that no discussion shall take place in the legislature of a State with respect to the conduct of any Judge of a High Court in the discharge of his duties. Article 215 makes every High Court a court of record and confers upon it all the powers of such a court including the power to punish for contempt of itself. Judges of the High Court, by Articles 217(1),

hold their tenure until they attain the age of 62 and not at the pleasure of the President. Appointments of officers and servants of a High Court are to be made under Article 229(1) by the Chief Justice of the High Court or such other Judge or officer of the Court as (sic) may direct. By Sub-clause (2) of that article, the conditions of service of officers and servants of a High Court shall, subject to the provisions of any law made by the legislature of the State, be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the Court authorised by the Chief Justice. Under Clause (3), the administrative expenses of the High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, are to be charged upon the Consolidated Fund of the State.

14. These provisions, indisputably, are aimed at insulating the High Court judiciary and even the officers and servants of the Court, from the influence of the executive. Not content with that, the framers of the Constitution introduced a fasciculus of articles in Chapter VI of Part VI of the Constitution, under the heading 'Subordinate Judiciary'. The provisions of Chapter VI, particularly Articles 233(1) and 235, gave rise to a spate of litigation between the State executives and High Courts which had to be resolved by this Court by keeping in view the high purpose of the particular provisions. This Court held that the scope and ambit of control vested in the High Courts under Article 235 covers the entire spectrum of administrative control and is not confined merely to general superintendence or to arranging the day-to-day work of the subordinate courts. Thus, the 'control' envisaged by Article 235 comprehends control over the conduct and discipline of District Judges (State of West Bengal v. Nrindera Nath Bagchi ; their further promotions and confirmations (State of Assam v. Kuseswar and Joginder Nath v. Union of India AIR 1975 SC 514; disputes regarding their seniority (State of Bihar v. Madan Mohan ; their transfers (State of Assam v. Ranga Muhammad) ; the placing of their services at the disposal of the Government for an ex-cadre post (State of Orissa v. Sudhansn Sekhar Misra [19681 2 SCR 1 54; considering their fitness for being retained in service and recommending their discharge from service (Ram Gopal v. State of Madhya Pradesh exercise of complete disciplinary jurisdiction over them including initiation of disciplinary inquiries (Punjab and Haryana High Court v. State of Haryana) ; and their premature retirement (State of Haryana v. Inder Prakash) . The last of the cases in this line is the recent judgment of this Court in Shamusher Singh v. Stale of Punjab in which the learned Chief Justice, delivering the leading judgment, observed: "The members of the subordinate judiciary are not only under the control of the High Court but are also under the care and custody of the High Court. "By a concurring judgment, Krishna Iyer J. said on behalf of Bhagwati J. and himself that fearless justice is a prominent creed of our Constitution and that "the independence of the judiciary is the fighting faith of our founding document."

15. Unquestionably, the fundamental principle on which these constitutional provisions and decisions rest cannot be allowed to be violated or diluted, directly or indirectly. But then the question is: Is there any need or justification, in order to uphold and protect the independence of the judiciary, for construing Article 222(1) to mean that a Judge cannot be transferred from one High Court to another without his consent? I think not. The power to transfer a High Court Judge is conferred by the Constitution in public interest and not for the purpose of providing the executive with a weapon to punish a Judge who does not toe its line or who, for some reason or the other, has fallen from its grace. The executive possesses no such power under our Constitution and if it can be

shown-though we see the difficulties in such showing that a transfer of a High Court Judge is made in a given case for an extraneous reason, the exercise of the power can appropriately be struck down as being vitiated by legal mala fides. The extraordinary power which the Constitution has conferred on the President by Article 222(1) cannot be exercised in a manner which is calculated to defeat or destroy in one stroke the object and purpose of the various provisions conceived with such care to insulate the judiciary from the influence and pressures of the executive. The power to punish a High Court Judge, if one may so describe it, is to be found only in Article 218 read with Articles 124(4) and (5) of the Constitution, under which a Judge of the High Court can be removed from his office by an order of the President passed after an address by each House of Parliament, supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, has been presented to the President in the same session for such removal, on the ground of proved misbehavior or incapacity. Thus, if the power of the President, who has to act on the advice of the Council of Ministers, to transfer a High Court Judge under Article 222(1) is strictly limited to cases in which the transfer becomes necessary in order to subserve public interest, in other words, if it be true that the President has no power to transfer a High Court Judge for reasons not bearing on public interest but arising; out of whim, caprice or fancy of the executive or its desire to bend a Judge to its own way of thinking, there is no possibility of any interference with the independence of the judiciary if a Judge is transferred without his consent.

16. Once it is appreciated that a High Court Judge can be transferred on the ground of public interest only, the apprehension that the executive may use the power of transfer for its own ulterior ends and thereby interfere with the independence of the judiciary, loses its force. It is true that a challenge to an order of transfer under Article 226 of the Constitution would involve much time and expense which a Judge can ill-afford. But it is notorious that court proceedings involve time and expense which often exceed the capacity of the litigants. The hardship, embarrassment or inconvenience resulting to a Judge by reason of his being compelled to become a litigant in his own court, cannot justify the addition of words to an article of the Constitution making his consent a precondition of his transfer. In adding such words, we will be confusing our own policy views with the command of the Constitution. But we hope and trust that in his fight against an overbearing executive, the Judge will not be waging a lone or unequal battle. The ink on recent history is still not dry and its pages contain a tribute to the gentlemen standing in black robes who, though small in number, championed public causes with a courage which dumbfounded even that world in which Martin Luther King and Lord Coke had lived and died. In fact, the missionary zeal of Mr. Sheth's counsel is by itself enough assurance that Judges in distress, in their unequal contest with the executive, will not fail to receive the assistance and attention of the illustrious at the bar.

17. In this view of the matter, it is unnecessary to consider at any length the decisions cited by Mr. Seervai in R.M.D. Chamarbaugwalla v. Union of India [1957] SCR 930 (at p. 936), Attorney General v. Prince Ernest Augustus of Hanover [1957] A.C. 436(at pp. 460-461) and The River Wear Commissioner v. William Adamson and Ors. [1876-77] A.C. 743 (at pp. 764-767).

18. In Chamarbaugwalla's case [1957] SCR 930 (at p. 936) the constitutionality of Sections 4 and 5 of the Prize Competitions Act and the rules made thereunder was challenged on the ground that the

definition of 'prize competition' included not merely competitions of a gambling nature but also those in which success depended to a substantial degree on skill, thereby violating the petitioners' fundamental right to carry on business under Article 19(1)(g) of the Constitution. It was held by this Court that on a proper construction, the definition of 'prize competition' took in only such competitions as were of a gambling nature and no others. Venkatarama Ayyar J. delivering the judgment of the Constitution Bench, observed that on a literal construction of the definition it was difficult to resist the contention of the petitioners that the definition covered competitions which depend to a substantial degree on skill but the fact that the Court had to ascertain the intention of the legislature from the words actually used in the statute did not mean that the decision must rest on the literal interpretation of the words in disregard of all other material: "To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope and object of the whole Act", (p. 936).

19. In Prince Ernest Augustus of Hanover (supra) a great great grand-son of Ernest, Duke of Cumberland, who succeeded to the throne of Hanover in 1837, sought a declaration that he was a British subject by virtue of the statute of 1705, 4 Anne, c. 4. Viscount Simonds, accepting the claim, said in his speech that "words and particularly general words, cannot be read in isolation: their colour and content are derived from their context. (p. 461).

20. In River Wear Commissioners, (supra) the Harbours, Docks and Piers Act, 1847 enacted, broadly, that the owner of every vessel shall be answerable to the undertakers for any damage done to the harbour by such vessel or by any person employed about the same and that the master or person having the charge of such vessel, through whose wilful act or negligence any such damage is done, shall also be liable to make good the same. Lord Blackburn observed in his speech that the golden rule of construction was that one must "take the whole statute together and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification and to justify the Court in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear." (pp. 764-765).

21. Since I have taken the view that a High Court Judge cannot be transferred as a matter of punishment, as for example, for the views which he bona fide holds and that his transfer, being conditioned by the requirements of public interest, cannot be effected for an extraneous purpose, it is unnecessary to extend to the instant case the ratio of these decisions. It is needless, in a broad sense, to cut down the width of the words used in Article 222(1) by making the power of transfer dependent on the consent of the Judge himself. It is also needless, in order to effectuate the object of the other constitutional provisions, to read any such limitation into that Article.

22. Experience shows that there are cases, though fortunately they are few and far between, in which the exigencies of administration necessitate the transfer of a Judge from one High Court to another. The factious local atmosphere sometimes demands the drafting of a Judge or Chief Justice from another High Court and on the rarest of rare occasions which can be counted on the fingers of a hand, it becomes necessary to withdraw a Judge from a circle of favourites and non-favourites. The

voice of compassion is heard depending upon who articulates it. Though transfers in such cases are pre-eminently in public interest, it will be impossible to achieve that purpose if a Judge cannot be transferred without his consent. His personal interest may lie in continuing in a Court where his private interest will be served best, whereas, public interest may require that his moorings ought to be served to act as a reminder that "the place of justice is a hallowed place". Mr. Seervai does see the possibility of such a need but he contends that if the choice is between two alternative evils, we should prefer the construction which will not impair the efficacy of the various safeguards created by the Constitution for unholding the independence of the judiciary and reject the other which will enable a Judea to be transferred in a few isolated cases of the type described above. This argument loses its force and validity in view of my holding that the transfer of a High Court Judge without his consent will not damage or destroy the provisions contained in the Constitution for preserving the independence of the judiciary.

23. Mr. Seervai relies upon a judgment of the House of Lords in Rondel v. Worslay [1969] 1 A.C. 191 (at pp. 228, 268, 270) where a litigant asked for damages for professional negligence from his counsel. On the question whether an action for negligence lies against a barrister, it was held that the immunity of a barrister from an action for negligence at the suit of his client in respect of his conduct and management of a cause in court was not based on the absence of a contract between the barrister and client but on public policy and long usage in that, the interests of administration of justice required that a barrister should be able to carry out his duties to the court fearlessly and independently. Lord Reid said in his speech that like so many questions which raised the public interest, a decision one way was likely to cause hardship to individuals, while a decision the other way would involve disadvantage to the public interest. The issue, according to the learned Law Lord, therefore was whether the abolition of the rule of immunity would probably be attended by such disadvantage to the public interest as to make its retention clearly justifiable (p. 228). Lord Pearce observed in his speech that to remove the immunity of a barrister from being sued for negligence would create a great injury to justice and, therefore, the immunity should be upheld (p. 268) and that though it would appear to some that rule of immunity creates many hardships for which there was no relief, yet the rule was consciously and consistently adopted by the English courts, "in order that a greater ill may be avoided, namely, the hampering and weakening of the judicial process." (p. 270). The five judgments in Rondel [1969] 1 A.C. 191 (at pp. 228, 268, 270) show the anxiety of courts to overlook an evil in order that a greater evil may be avoided. But this consideration is not relevant for our purpose since, in the view which I have taken, there is no question here of choosing between alternate evils. The construction which I have placed upon Article 222(1) would facilitate the transfer of a High Court Judge in appropriate cases, without doing any damage to the provisions of the Constitution which are conceived in the interests of an independent judiciary.

24. The last limb of Mr. Seervai's argument on the question of consent is that the transfer of a High Court Judge from one High Court to another results in a fresh appointment of the Judge to the other High Court and since a person cannot be appointed as a Judge without his consent, the transfer cannot be made save with the consent of the Judge. In support of this argument Mr. Seervai relies in the first place on the constitutional requirement that a Judge, upon being transferred to another High Court, has to take a fresh oath. It is quite correct that a Judge who is transferred to another High Court has to take a fresh oath before he assumes the charge of his office as a Judge of the High

Court to which he is transferred. But that does not support the argument that he enters upon a new office as a result of a fresh appointment. The simple fact is that a Judge is transferred to another High Court, not appointed once over again as a Judge of a High Court or even as a Judge of the High Court to which he is transferred, The reason why he has to take a fresh oath upon being transferred to another High Court is to be traced to the form of the oath prescribed for High Court Judges under Clause VIII, Third Schedule of the Constitution. The form of oath prescribed by that clause is "I, A.B., having been appointed Chief Justice (or a Judge) of the High Court at (or of) ... do swear in the name of God/ solemnly affirm that I will bear true faith and allegiance to the Constitution of India. . . .". Since the oath is required to be taken by a High Court Judge in his capacity as a Judge of a named High Court, it becomes necessary for him to take a fresh oath on being transferred to another High Court. The circumstances, therefore, that the Judge takes a fresh oath does not support the inference that he goes to another High Court under a new or fresh appointment.

25. It is important to notice that when a Judge is transferred from one High Court to another, the President merely issues a notification under Article 222(1) of the Constitution. He does not issue a warrant of appointment as he is required to do under Article 217(1), when a person is initially appointed as a Judge of a particular High Court. It is important further, that in the case of a new appointment the President is required by Article 217(1) to consult the Chief Justice of India, the Governor of the State and in the case of appointment of a Judge other than the Chief Justice, the Chief. Justice of the High Court. Article 222(1) provides for one prescription only: Consultation with the Chief Justice of India. No one has ever suggested, though that is not conclusive, that the transfer, being in the nature of a fresh appointment, must comply with the requirements of Article 217(1).

26. Relying upon the observations of Venkatarama Aiyar J. in M.P.V. Sundararamier v. State of Andhra Pradesh [1958] SCR 1422 (at p. 1478), counsel argues that the provisions of our Constitution have to be read in the light of the Government of India Act, 1935 since the Constitution has adopted the basic scheme of that Act. Clause (c) of the proviso to Section 222(2) of the Government of India Act provided that "the office of a Judge shall be vacated by his being appointed to be a Judge of the Federal Court or of another High Court". It is urged that since by the Government of India Act, appointments to the Federal Court were clubbed with the appointments to "another High Court" and since the Judge's consent was necessary in both cases, we should read the corresponding provision of the Constitution in Clause (c) of the proviso to Article 217(1) to mean that the process of transfer of a Judge from one High Court to another involves a fresh appointment. It is impossible to accept this contention. The Government of India Act did not contain any provision for the transfer of a Judge. That is why it provided that the office of a Judge shall be vacated either on the Judge being appointed to be a Judge of the Federal Court or on being appointed as a Judge of another High Court.

27. If anything, the learned Attorney-General seems to me to be justified in relying upon the legislative history of the provision regarding transfer in order to repel Mr. Seervai's submission. The Government of India Act spoke of a Judge being "appointed" to be a Judge of another High Court. Clause (c) of the proviso to Article 193(1) of the draft Constitution of India contained a similar provision to the effect that "the office of the Judge shall be vacated by his being appointed by the

President to be a Judge of the Supreme Court or of any other High Court". The draft Constitution too did not contain any provision for transferring a High Court Judge. But the drafting Committee incorporated a provision in Article 222(1) of the Constitution providing for the transfer of a Judge from one High Court to another. Significantly, the use of the expression 'appointed' was scrupulously avoided in that behalf. Clause (c) of the proviso to Article 217(1) reads to say that "the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court" (emphasis supplied). In this legislative background and seeing that Clause (c) itself makes a distinction between appointment and transfer, I find it difficult to accept the contention that the two mean one and the same thing. They connote two distinct concepts and one is not to be confused with the other.

28. It may be stated that when the consent of a High Court Judge was thought necessary, the Constitution has said so. Article 224A provides that the Chief Justice of a High Court for any State may, with the previous consent of the President, request any person who has held the office of a Judge of a High Court to sit and act as a Judge of the High Court for that State. The proviso to the article, which is relevant for our purpose, says that nothing in the article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that High Court, "unless he consents so to do". This consideration has, however its own limitations and cannot be carried too far. A Judge of the High Court cannot, surely, be compelled to work after retirement, which explains the necessity for obtaining his consent. Even a Government servant cannot be compelled to rejoin his duties after retirement. Much less a High Court Judge.

29. Finally, in a reverse way, reliance is placed by the learned Counsel on Section 2(c)(iii) of the High Court Judges (Conditions of Service) Act, 1954 which defines 'actual service' to include "joining time on transfer from a High Court to the Supreme Court or from one High Court to another...". Clause 11 (b) (iii) of Part D of the Second Schedule to the Constitution contains an identical provision. The argument is that though it is unquestionable that a High Court Judge can only be appointed, not transferred, to the Supreme Court, still these provisions equate 'transfer' with 'appointment' and therefore the two expressions are used to convey the same meaning and are accordingly interchangeable. I do not think that by reason of these provisions the two expressions, transfer and appointment, can be taken to mean one and the same thing. The provisions on which counsel relies pertain to the conditions of service of High Court Judges of which the intendment is that as in the case of a High Court Judge transferred to another High Court, so in the case of a High Court Judge appointed to the Supreme Court, actual service should include the joining time, as if the Judge is transferred to another Court. Such technical rules of procedure governing service conditions cannot affect the interpretation of a substantive provision like the one contained in Article 222(1).

30. Two things remain to be considered on this aspect of the matter: the requirement of national integration and the nature of relationship between Government and the High Court Judges.

31. As regards the first, no one can deny that whatever measures are required to be taken in order to achieve national integration would be in public interest. Whether it is necessary to transfer Judges from one High Court to another in the interests of national integration is a moot point. But that is a

policy matter with which courts are not concerned directly. One may, however, venture the observation that there are numerous other ways of achieving national integration more effectively than by transferring High Court Judges from one High Court to another, Considering the great inconvenience, hardship and possibly a slur, which a transfer from one High Court to another involves, the better view would be to leave the Judges untouched and take other measures to achieve that purpose. If at all, on mature and objective appraisal of the situation it is still felt that there should be a fair sprinkling in the High Court judiciary of persons belonging to other States, that object can be more easily and effectively attained by making appointments of outsiders initially. I would only like to add that the record of this case does not bear out the claim that any one of the 16 High Court Judges was transferred in order to further the cause of national integration. Far from it. Nothing was to be gained by transferring a Bombay Judge to Andhra Pradesh, who had less than nine months left for retirement. And however pressing the requirement of national integration may be, that could not have been achieved, on any bone fide assessment of the situation, by transferring to Calcutta another Bombay Judge who was hovering between life and death and who, ultimately, succumbed to the strain of the transfer as stated by Mr. Seervai.

32. On the other question, the rejection of Mr. Seervai's argument that a High Court Judge cannot be transferred without his consent, should not be read as a negation of his argument that there is no master and servant relationship between the Government and High Court Judges. In general, the relationship of master and servant imports the existence of power in the employer not only to direct what work the servant is to do, but also the manner in which the work is to be done (see Halsbury's Laws of England, Third Edition, Volume 25, page 447, para 871 and the cases cited in foot-note b). A servant undertakes to serve his master and to obey his reasonable orders within the scope of the duty undertaken. The Government has no power or authority to direct what particular work a High Court Judge must do and it can certainly not regulate the manner in which he must do his work in the discharge of his official functions. A High Court Judge is also not bound, nor does he undertake, to obey an order of the Government within the scope of his duties. Judges of the High Court owe their appointment to the Constitution and hold a position of privilege under it. Their tenure is guaranteed by Article 217(1) until they attain the age of 62. Their salary is protected by Article 221(1). They are entitled by Clause (2) of that article to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by Parliament and, until so determined, to such allowances and rights as are specified in the Second Schedule to the Constitution. By the proviso to Article 221(2), neither their allowances nor their rights in respect of leave of absence or pension can be varied to their disadvantage after their appointment; and they cannot be removed from their office save by following the procedure prescribed by Article 218 read with Articles 124(4) and (5). The very oath of office which they take in pursuance of Article 219 and in accordance with the form prescribed by Clause VIII of the Third Schedule, requires them to swear or affirm that they will perform the duties of their office "without fear or favour" and that they will "uphold the Constitution and the laws". "Without fear" is, primarily without fear of the executive; "without favour" is, primarily, without expecting a favour from the executive which notoriously commands a large patronage. And the pledge is that they shall "uphold the Constitution and the laws", not the commands of the executive. Thus, there is a fundamental distinction between the master and servant relationship as is generally understood and the relationship between the Government and High Court Judges. They, the Judges of the High Court, are not Government

servants in the ordinary signification of that expression.

33. In fact, that is why the Government cannot, on its own, take a unilateral decision in regard to the appointment and transfer of High Court judges. A Judge of the High Court can be appointed by the President only after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court; and he can be transferred from one High Court to another only after consultation with the Chief Justice of India. This consideration takes us to the next question, as important as the one of consent which has been just disposed of, as to what is the true meaning and content of 'consultation' provided for by Article 222(1) of the Constitution.

34. The Constitution speaks of consultation by the President in three situations in so far as judicial appointments are concerned. Article 124(2) provides that every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal "after consultation" with such of the Judges of the Supreme Court and of the High Courts in the States, "as the President may deem necessary for the purpose". The 1st proviso to Article 124(2) requires that in the case of appointment of a Judge other than the Chief Justice, "the Chief Justice of India shall always be consulted". Article 217(1) provides that every Judge of a High Court shall be appointed by the President by warrant under his hand and seal, "after consultation with the Chief Justice of India the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court". By Article 222(1), which is directly in issue.

The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.

35. Considering the importance which the Constitution gives to appointments to the highest echelons of the State and Union judiciary, it is hard to accept that the obligation which the Constitution imposes upon the President to consult the authorities named in the particular articles, casts no higher duty on the President than merely to convey to them what he proposes to do and obtain their answer. Before we go deeper into this point, it is necessary to notice the important distinction which the Constitution has made in the matter of consultation under Article 124(2) on the one hand and under the 1st proviso to that article on the other. While appointing a Judge of the Supreme Court, the President may consult such Judges of the Supreme Court and of the High Courts as he may deem necessary for the purpose. As contrasted with the proviso, this provision shows that there is no obligation on the President, while appointing a Judge of the Supreme Court, to consult any Judge or Judges of the Supreme Court or of the High Courts. Since he may or may not consult them, their opinion, in the event that the President decides to consult them, cannot stand on the same footing as the opinion of the authorities whom the President is under an obligation to consult. But more than that, since the President may or may not consult them, he has the right to decide upon the nature of consultation, if at all he decides to consult them. The 1st proviso to Article 124(2), which is in sharp contrast with it, says that in the case of appointment of a Judge of the Supreme Court other than the Chief Justice, the Chief Justice of India shall always be consulted. The proviso leaves no option to the President and casts on him a specific obligation that he shall always consult the Chief Justice of India in making an appointment of a Judge of the Supreme Court. Article 217(1) casts a similar obligation on the President while appointing a Judge of the High Court,

to consult the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. Article 222(1) is, in substance, worded in similar terms as the 1st proviso to Article 124(2) and Article 217(1). It casts an absolute obligation on the President 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 intervening 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 transfer 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 effectiveness, because the transfer of a High Court Judge to another High Court is unconstitutional unless, before transferring the Judge, the President consults the Chief Justice of India.

36. So far there is no difficulty, because it is nobody's case that the President can transfer a High Court Judge without consulting the Chief Justice of India. Consultation then being obligatory, the question which arises for consideration is: what exactly does the President have to do in the discharge of his constitutional obligation to consult the Chief Justice of India in the matter of the transfer of a High Court Judge ? What is, in other words, the nature of the process involved in what the Constitution conceives as consultation by the President with the Chief Justice of India ? What are its minimal requirements ? Is it sufficient for the President to apprise the Chief Justice of the proposed transfer and to await the reaction of the Chief Justice to the proposal? Or, does consultation mean something more meaningful than what may in practical terms be described as 'sounding' the Chief Justice ? Is the Chief Justice entitled upon being consulted by the President, to ask for the relevant data to enable him to tender his considered opinion on the subject ? These then are the important matters for consideration.

37. Article 222(1) which requires the President to consult the Chief Justice of India is founded on the principle that in a matter which concerns the judiciary vitally, no decision ought to be taken by the executive without obtaining the views of the Chief Justice of India who, by training and experience, is in the best position to consider the situation fairly, competently and objectively. But there can be no purposeful consideration of a matter, in the absence of facts and circumstances 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 Justice, 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 constitutional 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 complementary 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), therefore, means full and effective, not formal or unproductive, consultation.

38. In Words and Phrases (Permanent Edition, 1960, Volume 9, page 3) to 'consult' is defined as 'to discuss something together, to deliberate'. Corpus Juris Secundum (Volume 16A, Ed. 1956, page 1242) also says that the word 'consult' is frequently defined as meaning 'to discuss something together, or to deliberate'. Quoting Rollo v. Minister of Town and Country Planning [1948] 1 All E.R. 13C. A. and Fletcher v. Minister of Town and Country Planning [1947] 2 All E.R. 946 Stroud's Judicial Dictionary (Volume 1, Third Edition, 1952, page 596) says in the context of the expression "consultation with any local authorities" that "Consultation means that, on the one side, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender advice". Thus, deliberation is the quintessence of consultation. That implies that each individual case must be considered separately on the basis of its own facts. Policy transfers on a wholesale basis which leave no scope for considering the facts of each particular case and which are influenced by one-sided governmental considerations are outside the contemplation of our Constitution.

39. It may not be a happy analogy, but it is commonsense that he who wants to 'consult' a doctor cannot keep facts up his sleeve. He does so at his peril for he can receive no true advice unless he discloses facts necessary for diagnosis of his malady. Homely analogies apart, which can be multiplied, a decision of the Madras High Court in R. Pushpam and Anr. v. State of Madras furnishes a good parallel. Section 43(b), Madras District Municipalities Act, 1920, provided that for the purpose of election of Councillors to a Municipal Council, the Local Government 'after consulting the Municipal Council' may determine the wards in which reserved seats shall be set apart. While setting aside the reservation made in respect of one of the wards on the ground that the Local Government had failed to discharge its statutory obligation of consulting the Municipal Council, Justice K. Subba Rao, who then adorned the Bench of the Madras High Court, observed: "The word 'consult' 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 satisfactory solution." 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 consideration full and identical facts, which can at once constitute both the source and foundation of the final decision.

40. In Chandrambuleshwar Prasad v. Patna High Court and Ors. a question arose in an Article 32 petition whether there was due compliance with Article 233(1) of the Constitution which provides that appointments of persons to be and the posting and promotion of, District Judges in any State shall be made by the Governor of the State "in consultation with the High Court" exercising jurisdiction in relation to such State. While holding that a Government notification appointing the petitioner as an officiating District and Sessions Judge was in violation of Article 233, a Constitution Bench of this Court observed:

Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views. If one party mates a proposal to the other who has a counter proposal in his mind which

is not communicated to the proposer the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation.(pages 674-675).

41. This then, in my judgment, is the true meaning and content of consultation as envisaged by Article 222(1) of the Constitution. After an effective consultation with the Chief Justice of India, it is open to the President to arrive at a proper decision of the question whether a Judge should be transferred to another High Court because, what the Constitution requires is consultation with the Chief Justice, not his concurrence with the proposed transfer. But it is necessary to reiterate what Bhagwati and Krishna Iyer JJ. said in Shamsher Singh (supra) that in all conceivable cases, consultation with the Chief Justice of India should be accepted by the Government of India and that the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the executive if it departs from the counsel given by the Chief Justice of India. "In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order." (page 873). It is hoped that these words will not fall on deaf ears and since normalcy has now been restored, the differences, if any, between the executive and the judiciary will be resolved by mutual deliberation each, party treating the views of the other with respect and consideration.

42. One of the learned Judges of the Gujarat High Court, J.B. Mehta, J., has invalidated the order of transfer on the additional ground that it was made in violation of the principles of natural justice, a consideration which in my opinion is out of place in the scheme of Article 222(1). It is true that the frontiers of natural justice principles are ever-expanding and judges are becoming Increasingly conscious of the range of possibilities of those principles. They are anxious to impress the fundamentals of fair procedure on all those who exercise authority over others, statutory or otherwise, 'Natural justice' has a long history, one of the outstanding instances being Bentley's case R.V. University of Cambridge (1723) 1 S.T.R. 557 in which the Court of King's Bench held in 1723, that the Cambridge University could not deprive a great but unconventional scholar of his degrees without hearing his explanation for his misconduct. In Ridge v. Baldwin [1964] A.C. 40 the House of Lords voided the dismissal of a chief constable for unfit ness, on the ground that no hearing was given to him. This Court in State of Orissa v. Dr. (Miss) Binapani Dei, and A.K. Kraipak v. Union of India stretched the doctrine to further limits, But as observed by Hegde J: in Kripak , "the aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice....What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the frame-work of the law under which the enquiry is held and the Constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision of the facts of that case." (pages 156-157). The underlying principle thus is that drastic powers are intended to be exercised fairly and fairness demands an opportunity at least to know and meet the charge: "Absolute discretion, like corruption, marks the beginning of the end of liberty."

43. Article 222(1) postulates fair play and contains built-in safeguards in the interests of reasonableness. In the first place, the power to transfer a High Court Judge can be exercised in public interest only. Secondly, the President is under an obligation to consult the Chief Justice of

India which means and requires that all the relevant facts must be placed before the Chief Justice. Thirdly, the Chief Justice owes a corresponding duty, both to the President and to the Judge who is proposed to be transferred, that he shall consider every relevant fact before he tenders his opinion to the President. In the discharge of this constitutional obligation, the Chief Justice would be within his rights and indeed it is his duty whenever necessary, to elicit and ascertain further facts either directly from the Judge concerned or from other reliable sources. The executive cannot and ought not to establish rapport with the Judges which is the function and privilege of the Chief Justice. In substance and effect, therefore, the Judge concerned cannot have reason to complain of arbitrariness or unfair play, if the due procedure is followed. I must add that Mr. Seervai did not argue that the order of transfer is bad for non-compliance with the principles of natural justice.

44. This concludes the discussion on the points involved in the appeal. Unusually, in a matter of this importance, it is needless to work out the final order because at the end of the arguments, on August 26, 1977, the appellant and respondent 1 arrived at a settlement in the following terms:

On the facts and circumstances on record the present government do not consider that there was any justification for transferring Justice Sheth from Gujarat High Court and propose to transfer him back to that High Court.

On this statement being made by the learned Attorney-General, Mr. Seervai, Counsel for Respondent No. 1 (Justice S.H. Sheth), withdraws the writ petition with leave of the Court.

In view of this settlement, we passed the following order on that day:

We have heard the learned Attorney-General and Mr. Seervai fully on the various points arising in this appeal. We will deal with the arguments of the learned Counsel later by a considered judgment or judgments. For the present we will only say that since we are informed that the parties to the appeal have arrived at a settlement, the appeal shall stand disposed of in terms of that settlement.

45. To-day we have given our judgments in pursuance of this order.

P.N. Bhagwati, J.

46.This is an unusual case where a Judge of a High Court has been compelled to seek justice in a court of law against an unwarranted executive action. It raises questions of great constitutional significance affecting the entire High Court Judiciary. Can a Judge of a High Court be transferred to another High Court by the President, which in effect means by the Central Government, under Article 222, Clause (1) of the Constitution without his consent? What is the true interpretation of this constitutional clause; does it necessarily imply such consent ? And what is the meaning and effect of the constitutional requirement that such transfer may be made by the President "after consultation with the Chief Justice of India" ? What is the scope and content of this consultation and what are its basic essentials ? These are the questions that arise for determination in this appeal and they have been argued before us with great passion and fervour, not ordinarily seen in humdrum and routine cases, since they admittedly raise issues of the gravest character affecting the

independence of the judiciary which is one of the cardinal features of our Constitution sustaining the rule of law and infusing it with life and meaning. The decision of these questions may not be strictly necessary for disposing of this appeal, since at the close of the arguments an agreed formula was put forward on behalf of the parties and in pursuance of this formula, the first respondent with-drew his petition, but having regard to the great constitutional importance of these questions, I think the Court ought to express its opinion upon them, now that they have been raised and fully argued before us.

47. The first respondent Mr. Justice S.H. Sheth, who was a Judge of the Gujarat High Court since 23rd April, 1969, was, by a Presidential Order dated 27th May, 1976, transferred "as Judge of the High Court of Andhra Pradesh with effect from the date he assumes charge of his office". The order was purported to be made by the President in exercise of the powers conferred under Article 222, Clause (1) of the Constitution. The first respondent immediately filed Special Civil Application No. 911 of 1976 in the High Court of Gujarat challenging the validity of this order and he joined the Union of India as well as the Chief Justice of India as party respondents to the petition. The petition was admitted and rule issued by Mr. Justice D.A. Desai on 16th June, 1976. The first respondent did not apply for interim relief as he did not wish to continue to function as a Judge of the Gujarat High Court under an interim order made by the Court, but he had filed the petition pro bono public to assert and vindicate the independence of the Judiciary, since his was part of a mass transfer of 16 High Court Judges and it was said that more transfers were imminent. The petition was more in the nature of public interest litigation than private litigation for personal gain. The 1st respondent merely asked for expedition and the hearing of the petition was accordingly fixed on 26th July, 1976. The questions raised in the petition being of great importance, the Chief Justice of the Gujarat High Court constituted a Special Bench consisting of Mr. Justice J.B. Mehta, Mr. Justice A.D. Desai and Mr. Justice D.A. Desai, three of the senior most judges of the High Court to hear the petition. The hearing commenced on 30th August, 1976 and the argument of counsel for the 1st respondent continued for the whole day. On the next day, before the argument was resumed, a most extraordinary objection was raised by Mr. Raman, the then Additional Solicitor General, on behalf of the Union of India, which is the appellant before us. He was also appearing for the second respondent, the Chief Justice of India, but the objection raised by him was only on behalf of the appellant. And that objection was that the appellant had heard that some correspondence had taken place between the Chief Justice of India and some of the Judges of the Gujarat High Court, including the members of the Special Bench, in regard to transfers of High Court Judges and that the case should not, therefore, be heard by the Judges constituting the Special Bench. Since the objection was taken orally and was not in writing and Mr. Raman wanted further instructions from the Government of India, the hearing was adjourned to 7th September, 1976. On the adjourned date Mr. Raman was not present, but the junior counsel stated that the Government of India was pressing the objection, to which an answer was made on behalf of the 1st respondent that the objection could not be entertained as it was not put in writing and it was not disclosed as to what was the source of knowledge of the Government of India in regard to the correspondence supposed to have taken place between the Judges of the Gujarat High Court and the Chief Justice of India. Since it was stated on behalf of the Government of India in the course of the arguments that it had no knowledge of the contents of this correspondence, the Special Bench adjourned the hearing of the case and on 10th September, 1976 made an order stating that though the letter addressed by the Judges of the

High Court, including the members of the Special Bench, to the Chief Justice of India was a (highly confidential communication, they and their colleagues who were signatories to that letter, had no objection if the Chief Justice of India, who was the addressee of the letter, desired to produce it. The privilege of confidentiality was thus, in all fairness, withdrawn by the Judges of the High Court, who were signatories to this letter, but the Chief Justice of India chose not to produce it at the adjourned hearing of the petition on 20th September, 1976. And yet on the basis of this letter, the Government of India, through its counsel, maintained its objection that the Judges constituting the Special Bench should not hear the case and filed a written submission to that effect. There was considerable argument before the Special Bench in regard to this objection, but it was overruled and the Special Bench decided to proceed with the hearing of the petition on merits. The learned Attorney General, appearing on behalf of the Government of India, did not press this objection before us and it is, therefore, not necessary for me to consider it, but I cannot help remarking that it was improper on the part of the Government of India to raise such an objection and it betrayed lack of responsibility on the part of those who instructed counsel to do so. In the first place, it passes one's comprehension how the Government of India could possibly raise an objection against three Judges of the Special Bench hearing the petition against it, when the Judges themselves did not feel embarrassed in hearing it. It can safely be presumed that a High Court Judge who is the holder of a highly responsible office under the Constitution and whose function it is, by the terms of his oath, to administer justice "without fear or favour", would be sensitive enough to realise that justice must not only be done but must also appear to be done and if he feels, in the slightest measure, that by reason of any conscious bias or prejudice he may not be able to hold the scales of justice even or give an appearance of doing so, he would not take up the case. No High Court Judge worthy of his office would knowingly permit any cloud of bias or prejudice to darken his understanding or to influence his decision. This is the basic postulate on which rests the magnificent edifice of our system of administration of justice and no one should be more conscious of it, none should have greater faith in the impartiality of our superior judiciary, than the Government, be it Central or State. The Government of India should have had the fullest confidence that if the Judges constituting the Special Bench at all felt that they would not be able to do justice between the 1st respondent and the Government of India "without fear or favour" or to use the words of Edmund Burke, adopt the "cold neutrality of an impartial Judge", they would have themselves declined to hear the petition. The objection raised by the Government of India amounted to nothing short of a suggestion that it did not have confidence in the impartiality of its own judges. Moreover, the Act of the Government of India was all the more reprehensible because the objection raised by it was based on the most flimsy and tenuous material which it would not have required a moment's hesitation to dismiss as unworthy of consideration. The objection was based solely on the letter addressed by some of the judges of the High Court to the Chief Justice of India which, according to the Government of India, it had not seen and of the contents of which, it was admittedly not aware. It is difficult to appreciate how even without knowing what were the contents of this letter, the Government of India could raise an objection on the basis of such letter. It was to my mind an act of impropriety on the part of the Government of India. It would have been liable to the strongest condemnation even if it had proceeded from a private party and much more so, must it be regarded when the Government of India is party to it. I may also observe that when the Government of India raised an objection against the judges of the Special Bench hearing the petition on the basis of the letter addressed by them to the Chief Justice of India, it would have been better if the Chief Justice of India had

produced the letter; particularly when the privilege of confidentiality was withdrawn by its authors, for that would have helped to clear the position of the three judges, instead of leaving them in a situation where there might be some scope for uninformed criticism arising out of ignorance of the true state of affairs. The fact, however, remains that the Chief Justice of India did not produce the letter and knowing full well that there was nothing in the letter which would in any way effect their impartiality or embarrass them in discharging their judicial function, the three judges constituting the Special Bench rejected the objection and proceeded to consider the merits of the petition.

48. The impugned order of transfer was challenged in the petition principally on four grounds:

(i) that it was in violation of Article 222, Clause (1) of the Constitution as it was passed without the consent of the petitioner; on a true construction of Article 222, Clause (1) such consent must be necessarily implied in that Article;

(ii) that it was invalid because effective consultation with the Chief Justice of India was a condition precedent to the exercise of the power of the President to pass an order of transfer under Article 222, Clause (1) and the condition precedent had not been satisfied;

(iii) that it was invalid as it had been passed in breach of assurance given on behalf of the Government of India on the floor of Parliament on the faith of which the 1st respondent had accepted judgeship, with the result that the Government was bound by a promissory estoppel; and

(iv) that it was invalid because it militated against public interest.

Though ground (iii) was urged before the Special Bench and it was unanimously negatived, it was not reiterated before us on behalf of the 1st respondent and hence we need not say anything about it. So also ground (iv) was argued before the Special Bench and it was urged that the transfer of the 1st respondent was by way of punishment for a judgment delivered by him against the Government and was not in public interest for which alone an order of transfer could be made by the President under Article 222, Clause (1), but this contention too was not pressed before us on behalf of the 1st respondent as a ground for invalidating the order of transfer and it is, therefore, not necessary to consider it. One thing is, however, certain that the power to transfer a Judge from one High Court to another under Article 222, Clause (1) can be exercised only in public interest and it would be gross abuse of power to displace him from his High Court and transfer him to another High Court by way of punishment because he has decided cases against the Government. It is a power conferred on the President to be exercised in furtherance of public interest and not by way of victimisation for inconvenient decisions given by a High Court Judge. Here, on the record, it does appear that the transfer of the 1st respondent was punitive in character and was not prompted by considerations of public interest. It was admittedly part of mass transfers of 16 High Court Judges and though a suggestion was made by the Government of India in its affidavit in reply that the transfers were made with a view to strengthening national integration by cutting at the barriers of regionalism and parochialism, the Government of India did not choose to disclose the principle on which these 16 High Court Judges were picked oat for being transferred. It is indeed strange that the Government of India should have selected for transfer, by and large, those High Court Judges who had decided

cases against the Government during the emergency. I should have thought that when the 1st respondent averred in so many terms that his transfer was by way of punishment for deciding against the Government; the Government of India in its affidavit in reply should not have remained content merely with denying this averment, but should have frankly and candidly come forward with the reasons for which the transfer was affected and if it was for achieving national integration, what was the basis on which the 1st respondent was picked out for the purpose of transfer. That was the least which the Government of India could have done when it was dealing with the holder of a high constitutional office like a High Court Judge. But unfortunately, the Government of India adopted a 'high and mighty' attitude and staked its defence solely on the claim to unfettered power to transfer a High Court Judge under Article 222, Clause (1) and that does lend credibility to the argument that the transfer was not made in public interest, but was by way of punishment with a view to bringing pressure on High Court Judges to fall in line with the views of the Government. It is also difficult to understand why the news about the transfers of High Court Judges should have been blacked out, if the transfers were really in public interest. If the transfers were really in the interest of national integration, the news about the transfers should have been given the widest publicity and they should not have been withheld from the press. Moreover the Government of India admitted before us at the close of the arguments that the transfer of the 1st respondent was not justified. But, as pointed out above, it is not necessary to come to a definite finding whether the transfer of the 1st respondent was not in public interest since that contention was not pressed before us.

49. So far as ground (i) is concerned, Mr. Justice A.D. Desai held that, on a true construction of Article 222, Clause (1), a High Court Judge could not be transferred without his consent and since in the present case the transfer of the 1st respondent was admitted without his consent, the order of transfer was invalid. Mr. Justice J.B. Mehta and Mr. Justice D.A. Desai, on the other hand, took a different view and observed that the necessity of consent could not be implied in Article 222, Clause (1) and want of consent on the part of the 1st respondent did not have the effect of invalidating the order of transfer against him. All the three Judges were, however, agreed in regard to ground (ii) and they held that effective consultation with the Chief Justice of India was a condition precedent to the exercise of the power to pass an order of transfer under Article 222, Clause (1) and since there was no material on record to show that there was such effective consultation with the Chief Justice of India, the condition precedent was not satisfied and the order of transfer was bad. The Special Bench, on this view, allowed the petition and struck down the order of transfer as invalid. This order of the Special Bench is challenged in the present appeal preferred after obtaining certificate from the High Court.

50. It will be apparent from what is stated above that only grounds (i) and (ii) survive for consideration in this appeal. I shall presently examine these grounds, but before I do so, a few preliminary remarks in regard to the position of a High Court Judge under the Constitution would not be inapposite. Chapter V in Part VI of the Constitution deals with High Courts in the States. Article 214 provides that there shall be a High Court for each State and under Article 216, it is laid down that every High Court shall consist of a Chief Justice and such other judges as the President may from time to time deem it necessary to appoint. The mode of appointment and conditions of the office of a High Court Judge are provided in Article 217 and Clause (1) of that Article, so far as material, reads as follows:

217(1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court and shall hold office, in the case of an additional or acting Judge, as provided in Article 224 and in any other case, until he attains the age of sixty-two years:

Provided that-

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office by the President in the manner provided in Clause (4) of Article 124 for the removal of a Judge of the Supreme Court;

(c) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

Article 219 provides that every person appointed to be a Judge of a High Court shall, before he enters upon his office, make and sub-scribe before the Governor of the State, or some person appointed in that behalf by him, an oath or affirmation according to the forms set out for the purpose in the Third Schedule. That form is Form VIII and it runs inter alia as follows: "I A.B. having been appointed Chief Justice (or a Judge) of the High Court at (or of)...do swear in the name of God/solemnly affirm that....I will truly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear and favour, affection or illwill." It may be pointed here that the words "without fear or favour", which are to be found in the present Form of oath in Form VIII did not figure in the form of oath prescribed in Schedule IV to the Government of India Act, 1935 and they were an addition made by the Constitution. These words, of course, do not add anything to the nature of the judicial function to be discharged by the High Court Judge because, even without them, the High Court Judge would, by the very nature of the judicial function, have to perform the duties of his office without fear or favour, but they serve to highlight two basic characteristics of the judicial function, namely, independence and impartiality. Two propositions clearly emerge on a consideration of these provisions read in the context of the constitutional scheme. The first is that the appointment contemplated under these provisions is appointment of a person as a Judge of a particular High Court and not as a Judge simpliciter. There is no All-India Cadre of High Court Judges. Secondly, a Judge of the High Court is not a Government servant, but he is the holder of a constitutional office. He is as much part of the State as the executive Government. The State has in fact three organs, one exercising executive power, another exercising legislative power and the third exercising judicial power. Each is independent and supreme within its allotted sphere and it is not possible to say that one is superior to the other. The High Court, constituted of the Chief Justice and other Judges, exercises the judicial power of the State and is coordinate in position and status with the Governor aided and advised by the Counsel of Ministers, who exercises the executive power and the Legislative Assembly together with the Legislative Council, if any, which exercises the legislative power of the State. Plainly and unquestionably, therefore, a High Court Judge is not subordinate either to the executive or to the legislature. It

would, indeed, be a constitutional heresy to so regard him. He has a constitutional function to discharge, which includes adjudication of the question whether the executive or the legislature has over stepped the limits of its power under the Constitution. No doubt Article 217, Clause (1) provides for appointment of a person to the office of a High Court Judge by the President, which means in effect and substance the Central Government, but that is only laying down a mode of appointment and it does not make the Central Government an employer of a High Court Judge. In fact a High Court Judge has no employer: he occupies a high constitutional office which is coordinate with the executive and the legislature.

51. Now the independence of the judiciary is a fighting faith of our Constitution. Fearless justice is a cardinal creed of our founding document. It is indeed a part of our ancient tradition which has produced great judges in the past. In England too, from where we have inherited our present system of administration of justice in its broad and essential features, judicial independence is prized as a basic value and so natural and inevitable it has come to be regarded and so ingrained it has become in the life and thought of the people that it is now almost taken for granted and it would be regarded an act of insanity for any one to think otherwise. But this has been accomplished after a long fight culminating in the Act of Settlement. 1688. Prior to the enactment of that Act. a Judge in England held tenure at the pleasure of the Crown and the Sovereign could dismiss a Judge at his discretion, if the judge did not deliver judgments to his liking. No less illustrious a judge then Lord Coke was dismissed by Charles I for his glorious and courageous refusal to obey the King's writ de non procedendo rago inconsulto contending him to step or to delay proceedings in his court. The Act of Settlement, 1688 put it out of the power of the Sovereign to dismiss a judge at pleasure by substituting 'tenure during good behavior for 'tenure at pleasure. The Judge could then say, as did Lord Bowen so eloquently:

These are not days in which any English Judge will fail to assert his right to rise in the proud consciousness that justice is administered in the realms of Her Majesty the Queen, immaculate, unspotted and unsuspected. There is no human being whose smile or frown, there is no Government, Tory or Liberal, whose favour or disfavour can start the pulse of an English Judge upon the Bench, or move by one hair's breadth the even equipoise of the scales of justice.

The framers of our Constitution were aware of these constitutional developments in England and they were conscious of our great tradition of judicial independence and impartiality and they realised that the need for securing the independence of the judiciary was even greater under our Constitution than it was in England, because ours Is a federal or quasi-federal Constitution which confers fundamental rights, enacts other constitutional limitations and arms the Supreme Court and the High Courts with the power of judicial review and consequently the Union of India and the States would become the largest single litigants before the Supreme Court and the High Courts. Justice, as pointed out by this Court in Shamsher Singh v. State of Punjab can become "fearless and free only if institutional immunity and autonomy are guaranteed". The Constitution makers, therefore, enacted several provisions designed to secure the independence of the superior judiciary by insulating it from executive or legislative control, I shall briefly refer to these provisions to show how great was the anxiety of the Constitution makers to ensure the independence of the superior judiciary and with what meticulous care they made provisions to that end.

52. Every judge of a High Court is entitled to hold office until he attains the age of 62 years and unless he voluntarily resigns Ms office or is removed from his office by the President in the manner provided in Clause (4) of Article 124 by a procedure analogous to impeachment for proved misbehavior or incapacity or he is appointed to be a judge of the Supreme Court or is transferred to another High Court, he cannot be removed from office. His security of tenure upto the age of 62 years is guaranteed. Vide Article 217, Clause (1). The salary and allowances of a High Court Judge are charged on the Consolidated Fund of the State under Article 202, Clause (3) (d) so that under Article 203 Clause (1) they are not subject to the vote of the Legislative Assembly, the object being that the legislature should not be in a position to effect the independence of the High Court judiciary by exercising pressure through refusal to vote the salary and other allowances. Similarly, the pension payable to a High Court Judge is charged on the Consolidated Fund of India under Article 112, Clause (3) (d) (iii) so that under Article 113, Clause (1) it is not required to be submitted to the vote of Parliament and it is put out of the power of Parliament to refuse to vote pension and thus hold out a threat of injury to a High Court Judge. Further, under Article 221, Clause (2) it is provided that "neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment". Then there is Article 211 which prohibits any discussion in the Legislature of a State with respect to the conduct of a Judge of a High Court in the discharge of his duties. The High Court Judge is insulated from fear of criticism of his judicial acts by the Legislature which is essentially a political assembly. This would enable a High Court Judge to act fearlessly in administering Justice in the discharge of his duties. Article 215 confers upon the High Court a power to punish for contempt of itself and thus protect itself against interference in the course of administration of justice from whatever source it may come. Form VIII in the Third Schedule which is the form of oath prescribed for a Chief Justice or a Judge of a High Court also emphasises the absolute necessity for judicial independence if the oath is to be observed, because it requires the Judge to swear that he will perform the duties of his office "without fear or favour, affection of ill-will". The independence of the High Court is also sought to be reinforced by Article 229 which provides that appointments of officers and servants shall be made by the Chief Justice or such other Judge or officer as he may appoint, so that there is not even indirect interference with judicial administration by the executive. And hovering over all these provisions like a brooding omnipresence is Article 50 which lays down, as a Directive Principle of State Policy, that the State shall take steps to separate the judiciary from the executive in the public services of the State. This provision, occurring in a chapter which has been described by Granville Austin as "the conscience of the Constitution" and which embodies the social philosophy of the Constitution and its basic underpinnings and values, plainly reveals, without any scope for doubt or debate, the intent of the Constitution makers to immunise the judiciary from any form of executive control or interference.

53. But this is not all. There are also other provisions in the Constitution which clearly disclose the anxiety of the Constitution makers to secure the independence of the judiciary. Chapter VI in Part VI of the Constitution deals with subordinate courts and, as pointed out by this Court in the State of West Bengal and Anr. v. Nripenbanath Bagchi Articles 233 to 237 which occur in this Chapter are designed to make the High Court the sole custodian of control over the Subordinate Judiciary, except in so far as exclusive jurisdiction is conferred upon the Governor in regard to appointment, posting and promotion of District Judges. The question of interpretation of these Articles arose in

Nripendranath Bagchi's case where the point at issue was as to which authority is entitled to exercise disciplinary jurisdiction over a member of Subordinate Judiciary-the High Court or the State Government. This Court traced the history relating to the Subordinate Judiciary and observed that "the history which lies behind the enactment of these Articles indicates that control was vested in the High Court to effectuate a purpose, namely, the securing of the independence of the Subordinate Judiciary and unless it included disciplinary control as well, the very object would be frustrated" and held that disciplinary jurisdiction is comprehended within the broad sweep of 'control' vested in the High Court under Article 235 and hence the High Court alone has disciplinary control over the Subordinate Judiciary. Then again, in the State of Assam v. Ranga Mahmmad and Ors. a question arose whether transfer of a District Judge is within the exclusive power of the High Court or the State Government is entitled to make such transfer. The determination of this question depended upon the true meaning of the word 'posting' in Article 233. Does 'posting' mean stationing a person at a place so as to include transfer or is it limited only to initial posting on appointment or promotion to a vacancy in the cadre. If it is the former, transfer would be within the power of the Governor under Article 233, but if it is the latter, transfer would "necessarily be outside the power of the Governor and fall to be made by the High Court as part of the control vested in it by Article 235". This Court preferred the narrower meaning, since it was more in accord with the constitutional policy of securing the independence of the Subordinate Judiciary and held that transfer of a District Judge is "a matter of control of District Judges which is vested in the High Court" under Article 235. It is apparent that under Article 233 to 237 the control over the Subordinate Judiciary in respect of transfer and disciplinary action is vested in the High Court to the exclusion of the State Government for a purpose and that purpose is the securing of judicial independence. That is why Krishna Iyer, J., speaking on behalf of himself and me, pointed out in Shamsher Singh v. State of Punjab (supra), "the exclusion of executive interference with the Subordinate Judiciary, i.e., grass-roots justice, can prove a teasing illusion if the control over them is vested in two masters, viz., the High, Court and the Government, the latter being otherwise stronger". It will thus be seen that even with regard to the Subordinate Judiciary the framers of the Constitution were anxious to secure that it should be insulated from executive interference and once appointment of a Judicial Officer is made, his subsequent career should be under the control of the High Court and he should not be exposed to the possibility of any improper executive pressure. If such was the concern of the Constitution makers in regard to the independence of the Subordinate Judiciary, their anxiety to secure the independence of the superior judiciary could not have been any the less and it is this thought that must animate and guide our interpretation of Article 222, Clause (1) which confers on the President power to transfer a Judge from one High Court to another.

54. With these prefatory observations I may now go straight to the interpretation of Article 222, Clause (1). Article 222 consists of two Clauses which read as follows:

22(1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.

(2) When a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be

determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix.

There was an original Clause (2) in Article 222 which was in almost identical terms. It was omitted by the Constitution (Seventh Amendment) Act, 1956 but it was again introduced in its present form by the Constitution (Fifteenth Amendment) Act, 1963. It provides for payment of compensatory allowance to a Judge who has been transferred from one High Court to another. This Clause has no material bearing on the controversy in the present appeal, but it does postulate that transfer of a High Court Judge would inflict an injury on him for which, in all fairness, compensatory allowance should be paid to him. Now, according to the plain natural meaning of the words used in Clause (1), it does appear that the only limitation on the exercise of the power of the President to transfer a Judge from one High Court to another is that there must be previous consultation with the Chief Justice of India and there is no explicit requirement that the transfer may be made by the President only with the consent of the Judge. But the question is: can the requirement of consent be read into this clause by necessary implication ? That would depend on the interpretation of the language of this clause in the light of the well recognised canons of construction. To that question I will now turn.

55. Now, it is undoubtedly true that where the language of an enactment is plain and clear upon its face and by itself susceptible to only one meaning, then ordinarily that meaning would have to be given by the Court. In such a case the task of interpretation can hardly be said to arise. But language at best is an imperfect medium of expression and a variety of significations may often lie in a word of expression. It has, therefore, been said that the words of a statute must be understood in the sense which the legislature has in view and their meaning must be found not so much in a strictly grammatical or etymological propriety of language, nor in its popular use, as in the subject or the occasion on which they are used and the object to be attained. It was said by Mr. Justice Holmes in felicitous language in Town v. Elsner, 245 U.S. 418 that "a word is not a crystal, transferant and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used". The words used in a statute cannot be read in isolation; their colour and content are derived from their context and, therefore, every word in a statute must be examined in its context. And when I use word 'context', I mean it in its widest sense "as including not only other enacting provisions of the same statute but its preamble, the existing state of the law, other statutes in para materia and the mischief which-the statute was intended to remedy". The context is of the greatest importance in the interpretation of the words used in a statute. "It is quite true" pointed out by Judge Learned Hand in Helvering v. Gregory, 69 F (2) (d) 809 "that as the articulating of a statute increase, the room for interpretation must contract; but the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes and no degree of particularity can ever obviate recourse to the setting in which all appear and which all collectively create." Again, it must be remembered that though the words used are the primary and ordinarily the most reliable, source of interpreting the meaning of any writing, be it a statute, a contract, or anything else, it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary, but to remember that a statute always has some purpose or object to accomplish, whose sympathetic and imaginative discovery, is the surest guide to its meaning. The literal construction should not obsess the Court, because it has only prima

facie preference, the real object of interpretation being to find out the true instant of the law maker and that can be done only by reading the statute as an organic whole, with each part throwing light on the other and bearing in mind the rule in Heydon's case (1584) 3 W. Rep. 16: 76 E.R. 637 which requires four things to be "discerned and considered" in arriving at the real meaning: (1) what was the law before the Act was passed; (2) what was the mischief or defect for which the law had not provided; (3) what remedy Parliament has appointed; and (4) the reason of the remedy. There is also another rule of interpretation which is equally well settled and which seems to follow as a necessary corollary, namely, where the words, according to their literal meaning "produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification", the Court would be justified in "putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear". Vide River Wear Commissioners v. Adamson (1876-77) App. Cs. 743 at 764. It is in the light of these principles of interpretation that I must proceed to consider what is the true meaning and effect of Clause (1) of Article 222: whether it permits transfer of a Judge from one High Court to another, irrespective of his consent.

56. Now, transfer of a Judge may be consensual, i.e., with consent, or compulsory, i.e., without consent and the word 'transfer' according to its plain natural meaning would include both kinds of transfer. But the question is whether, having regard to the manifest intent of the Constitution makers to secure the independence of the superior Judiciary and the context and the setting of the provision in which the word 'transfer' occurs, should it be interpreted in its wider sense to include compulsory transfer as well as consensual transfer, or it should be given a narrower meaning limited only to consensual transfer. There are, in my opinion, two weighty reasons why the more limited meaning should be preferred and 'transfer' should be read as confined to consensual transfer.

57. In the first place, it cannot be seriously disputed that the transfer of a Judge from one High Court to another would ordinarily inflict personal injuries on him. He would be displaced from his original home where he might have spent a major part of his life and he might have to maintain two establishments involving him in considerable extra expenditure; This was in fact admitted by Shri Asoke Sen, the then Minister for Law, in the course of his speech on the floor of the Lok Sabha on 30th April, 1963 when he said: "-it is very difficult for a Judge who is rooted to one place to go on transfer so that in most cases he may have to maintain his family in both the places and his expenses will increase". The education of the children of the Judge might also be affected, if not disrupted for a time, particularly since the medium of instruction in schools and colleges in most States is the regional language. The medical facilities also vary from State to State and the State to which the Judge is transferred might not have the same quality of medical services as his home State. So also the climate of the other State might not agree with the health of the Judge and he might be put to great hardship and hazard, as for example, where a Judge who is not accustomed to severe cold is transferred to the High Court of Jammu & Kashmir or to the High Court of Himachal Pradesh, or a Judge who is vulnerable to humid climate is sent to the Calcutta High Court or to the High Court of Assam. If the Judge's wife is engaged in a full time or part time employment in the State, his transfer to another State might require the wife to give up her employment or the husband to stay apart from his wife at least for nine months in a year and the same would be true if the wife has set up or inherited a business. Furthermore, the transfer would inflict an additional disability on the Judge, in

that, he would be disabled from practising not only in the High Court to which he was originally appointed, but also in the High Court to which he is transferred so that repeated transfers might prevent him from practising in a number of High Courts after his retirement. It would also be highly inconvenient and expensive to the Judge to go to his home State on auspicious occasions or in case of death or illness of some close relative, particularly where he is transferred to a distant High Court, as happened in the case of a few of the 16 judges picked out for transfer. The compensatory allowance payable to the Judge in such a case would reimburse him only in respect of the expenditure on two establishments, but the other injuries would, by their very nature, be incapable of compensation and would cause hardship and suffering to the Judge and the members of the family. It would, thus, be seen that the power to transfer a Judge from one High Court to another is not an innocuous power but it is a power the exercise of which would almost inevitably inflict injuries on the Judge who is subjected to such transfer. That is why Krishna Iyer, J., speaking on behalf of himself and me in Shamsher Singh's case (supra), pointed out that "sometimes a transfer can be more harmful than punishment" and this Court preferred to give a narrow meaning to the word 'posting' in Article 233 so as to take the power of transfer out of the reach of the executive and vest it exclusively in the High Court.

58. Now, it cannot be disputed that, on the terms of Article 222, Clause (1), the power of transfer is conferred on the President, which means in effect and substance the executive, since the President cannot act save in accordance with the aid and advice of the council of ministers. If, on a proper construction of Clause (1) of Article 222, the power of transfer could be exercised by the executive and the High Court Judge could be transferred without his consent, it would be a highly dangerous power, because the executive would then have an unbridled charter to inflict injury on a High Court Judge by transferring him from the High Court to which he originally agreed to be appointed to another High Court, if he decides cases against the Government or delivers judgments which do not meet with the approval of the executive. That would gravely undermine the independence of the judiciary, for the High Court Judge would then be working constantly under a threat that if he does not fall in line with the views of the executive or delivers judgments is not to its liking, he would be transferred, may be to a far-off High Court. It must be remembered that though, by and large, our Judges (and their number, I am sure, is quite large) are made of sterner stuff and no threat of injury, however grave or serious, would deflect them from doing their duty "without fear or favour", some judges may, on account of threat of transfer, be induced, albeit not consciously or deliberately, to do that which pleases the executive to avert such injury and if they are competent and skilled in judicial craftmanship, it would not be difficult for them to find arguments to justify their action in falling in line with the wishes of the executive, because reason is a ready-enough advocate for the decision, one, consciously or unconsciously, desire to reach. One may recall the brilliant fling of Shri Aurobindo in his epic poem 'Savitri':

An inconclusive play is Reason's toil;

Each strong idea can use her as its tool;

Accepting every brief she pleads her case.

Open to every thought she cannot know.

This would not only have a demoralising effect on the High Court judiciary, but it would also shake the confidence of the people in the administration of justice in cases where the Government is a party. It is no doubt true that previous consultation with the Chief Justice of India is a condition precedent to the exercise of the power of transfer by the executive and, as I shall presently point out, this consultation is not a mere idle formality, but has to be real and substantial, but even so I do not think it affords sufficient protection to the High Court Judge against unjustified transfer by the executive. It is settled law that though consultation with the Chief Justice of India is obligatory and as pointed out by this Court in another connection, the opinion of the Chief Justice of India should be given the greatest weight, it would not be strictly binding on the President, that is, the executive and for all practical purposes the final decision would rest in the hands of the executive, so that in the ultimate analysis the High Court Judge would, in the matter of transfer, remain directly under the control of the executive. Moreover, there is no guarantee that the Chief Justice of India, with whom consultation is made a constitutional imperative, would always be able to safeguard the interest of the High Court Judge. In fact, the mass transfers of 16 High Court Judges, including the 1st respondent, which took place in May-June 1976 clearly demonstrate the inadequacy of the safeguard of previous consultation with the Chief Justice of India. It is obvious and recent history has proved it beyond doubt, that it is dangerous to lodge unfettered power in the executive to inflict injury on a High Court Judge and the check of consultation with one single individual, howsoever highly he may be placed in the judicial heirarchy, is illusory and unreal. It is essential for free and independent judiciary that power exercisable over it should not be left wholly in the hands of the executive and it should not be enough merely to consult the Chief Justice of India to get a charter to exercise the power in such manner as the executive thinks fit. It would not be safe to entrust to the executive or to one single individual, howsoever high and lofty, the power to inflict injury on a High Court Judge. Power, in order to obviate the possibility of its abuse or misuse, should be broad based and divided and it should be hedged in by proper safeguards. But here, on the interpretation canvassed on behalf of the Government, the executive would be free to inflict injury on a High Court Judge by transferring him without his consent and there would be no effective check on the exercise of such power by the executive. Of course, it is a basic principle of law that every power conferred by a statute must be exercised reasonably with a view to effectuating the purpose for which the power is conferred and the power of transfer conferred on the executive can be exercised only in public interest to advance the cause of administration of justice and consequently, if the transfer of a High Court is made for a collateral or improper purpose which does not subserve the interest of administration of justice, it can be struck down as invalid at the instance of the Judge who is transferred, but this remedy would be meaningless and futile, because it would be almost impossible for the High Court Judge to take legal proceedings for challenging the transfer and even if he takes such proceedings, it would be very difficult for him to establish that the transfer is prompted by a collateral or improper purpose and is not in public interest. The net result would be that the High Court Judge would be without any effective remedy and he would have to submit to the transfer made by the executive, as did all the 16 judges affected by the mass transfers, barring the 1st respondent and that would most assuredly have the tendency to undermine the independence of the High Court Judiciary.

59. Now, when the Constitution makers prized the independence of the judiciary as a cardinal virtue and accepted it as an article of faith necessary for infusing life and meaning in the rule of law and with that end in view, made detailed provisions in the Constitution, with the greatest care, insulating the High Court Judiciary from executive influence or interference in any form. It is inconceivable that they should have left a loophole and conceded power to the executive to inflict injury on a High Court Judge by transferring him without his consent, so as to wipe out the effect of the other provisions and denude them of meaning and content. Let us recall the passionate eloquence of the Constitution makers in support of the independence of the judiciary while debating the provisions in the Draft Constitution relating to the superior Judiciary. Was it not said in the course of the debate in the Constituent Assembly in words aglow with conviction and passion: "If the beacon of the judiciary is to remain bright, courts must be above reproach, free from coercion and from political influence ?" And, did Jawaharlal Nehru not say in his unimitable way that it was most important that the High Court Judges should be men of the highest integrity, "people who can stand against the executive government and whoever come in their way". Did not every speaker vie with the other to assert that the judiciary must be free from executive influence or pressure and judicial independence was of the greatest importance ? Such was the great anxiety and solicitude of the Constitution makers for the independence of the judiciary and it is difficult to believe that with all this overweening concern for judicial independence, the Constitution markers could have intended to enact a provision which has the tendency and effect to imperil the independence of the judiciary, particularly when they took care to introduce in the Constitution elaborate provisions concretising the concept of independence of the judiciary. It also seems highly anomalous that the transfer of Subordinate Judges should be wholly within the control of the High Court in order to insulate them from improper executive pressure, while the transfer of High Court Judges, for whose independence most elaborate provisions have been made in the Constitution, should be left in the hands of the executive. It is impossible to imagine that the Subordinate Judiciary should have been intended to be protected from executive interference or pressure but not the High Court Judiciary. If the anxiety of the Constitution makers was to secure the independence of the Subordinate Judiciary by putting it out of the power of the executive to transfer a Subordinate Judge, it can safely be presumed that they were equally, if not more, solicitous to safeguard the independence of the High Court Judiciary and they could not have intended to leave to the executive the power to transfer a High Court Judge without his consent. It is no doubt true that the words "without his consent" are not to be found in Clause (1) of Article 222, but the word 'transfer' which is used there is a natural word which can mean consensual as well as compulsory transfer and if the High and noble purpose of the Constitution to secure that independence of the superior Judiciary by insulating it from all forms of executive control or interference is to be achieved, the word 'transfer' must be read in the limited sense of consensual transfer. It must be remembered that when the Court interprets a constitutional provision, it breathes life into the inert words used in the founding document. The problem before the Constitution Court is not a mere verbal problem. "Literalness", observed Frankfurter, J., "may strangle meaning" and he went on to add in Massachusatts S. & Insurance Co. v. V.S. (1956) 352 U.S. 128 that "there is no surer way to misread a document than to read It literally." The Court cannot interpret a provision of the Constitution by making "a fortress out of the dictionary". The significance of a constitutional problem is vital, not formal: it has to be gathered not simply by taking the words and a dictionary, but by considering the purpose and intendment of the framers as gathered from the context and the setting in which the words occur. The difficulty of gathering the

true intent of the law giver from the words used in the statute was expressed by Holmes, J., in a striking and epigrammatic fashion when he said: "Ideas are not often hard but the words are the devil" and this difficulty is all the greater when the words to be construed occur in a constitutional provision, for, as pointed out by Cardozo, J., the process of constitutional interpretation is in the ultimate analysis one of reading values into its clauses. I would, in the circumstances, unhesitatingly read the word 'transfer' in Clause (1) of Article 222 as confined to consensual transfer in order to give effect to the paramount intention of the Constitution makers to safeguard the independence of the superior Judiciary by placing it out of the reach of the power of the executive. I am fortified in this approach by the high authority of the decision of this Court in Ranga Mohammad's case (supra) which was an analogous case, where a limited meaning was given to the word 'posting' in Article 233 so as to be confined only to initial posting on appointment or promotion, with a view to a effectuating the constitutional policy of securing the independence of the Subordinate Judiciary.

60. This view, which I am taking, is also supported by the scheme and language of the relevant constitutional provisions. It may be noticed that the basic postulate underlying these constitutional provisions is that a person is appointed as a judge of a particular High Court and not a High Court judge simpliciter. There is no All-India cadre of High Court judges. When a person is appointed a Judge of a particular High Court, he has to make or subscribe an oath or affirmation before the Governor of the State and then only he assumes charge of his office and becomes a Judge of that High Court. He is then entitled to continue to occupy the office of Judge of that High Court until he attains the age of 62 years, subject to three provisos, of which the first two, which provide for resignation and removal, are immaterial and the third is that his office shall be vacated by his "being appointed by the President to be a Judge of the Supreme Court or his being transferred by the President to any other High Court within the territory of India". Now under the Government of India Act, 1935 also there was a similar provision in proviso (c) to Sub-section (2) of Section 200, but this provision employed a slightly different phraseology and provided that the office of a High Court Judge shall be vacated "by his being appointed to be a Judge of the Federal Court or of another High Court." Neither in proviso (c) nor in any other provision of the Government of India Act, 1935 was the word 'transfer' used and there was also no specific provision in that Act conferring power to transfer a High Court Judge. The power to transfer a High Court Judge was expressly conferred for the first time under the Constitution and it was provided that the office of a High Court Judge shall be vacated by his being transferred to another High Court. The question is whether the use of the word 'transfer' in the Constitution makes any difference to the position which obtained under the Government of India Act, 1935. There is one difference which is obvious and it is that, whereas under the Government of India Act, 1935, it was only when appointment to another High Court was made by the Governor-General by following the procedure prescribed for making such appointment, that the Judge vacated his office as judge of the original High Court, the position under the Constitution is that appointment of a Judge to another High Court can be made by transfer and such appointment would not have to go through the procedure prescribed for a new appointment. Transfer of a Judge under the Constitution is a mode of appointment to the High Court to which the Judge is transferred. This becomes patently clear if it is borne in mind that when a Judge is transferred to another High Court, he has to make and subscribe a fresh oath or affirmation before the Governor of the State to which he is transferred, before he can enter upon the office of Judge of that High Court and that oath or affirmation has to be in Form VIII in the Third

Schedule. The Judge who is transferred is, therefore, by the modality of transfer, appointed as a Judge of the High Court to which he is transferred and he becomes a Judge of that High Court only when he makes or subscribes an oath or affirmation before the Governor of that State. It is only then that the transfer of the Judge from one High Court to another is complete and he ceases to be a Judge of the High Court from where he is transferred. It could not have been intended by the Constitution makers that a Judge of a High Court should vacate his office and cease to be a Judge of that High Court as soon as an order of transfer is made and before he makes or subscribes an oath or affirmation before the Governor of the State and assumes charge of his office as Judge of the High Court to which he is transferred. That would bring about a hiatus in service which could never have been contemplated by the Constitution makers. The act of assumption of office of Judge of the High Court to which the transfer is made must necessarily be simultaneous in point of time with the act of vacating the office of Judge of the High Court from where the transfer is made. In fact, the latter event completes the process of transfer and produces the former consequence. It may also be noted that though proviso (c) to Clause (1) of Article 217 speaks of the office of Judge of a High Court being vacated by his being appointed to be a Judge of the Supreme Court, Clause (11) (b) of the Second Schedule refers to such appointment as "transfer from a High Court to the Supreme Court". This clearly shows that the word 'transfer' is used by the Constitution makers in the mechanical sense of going from one post to another and not in the sense in which it is ordinarily used where there is transfer from one station to another within the same cadre. Even appointment of a High Court Judge to the Supreme Court is regarded as transfer to the Supreme Court. I have, therefore, no doubt that when a Judge is transferred from one High Court to another, he is appointed to the High Court to which he is transferred and it is only when he assumes charge of the office of Judge of that High Court by making and subscribing an oath or affirmation before the Governor of the State, that he ceases to be a Judge of the High Court from where he is transferred. Now, it is difficult to believe that the Constitution makers could have ever intended that appointment of a Judge to a High Court or to the Supreme Court could be made without his consent. How would such appointment become effective unless the Judge who is appointed makes and subscribes an oath or affirmation before the Governor, in case of appointment to the High Court and before the President, in case of appointment to the Supreme Court. And that would plainly be a matter within the volition of the Judge. It is, therefore, obvious that the volition of the Judge who is transferred is essential for making the transfer effective and there can be no transfer of a Judge of a High Court without his consent. This is the position which emerges clearly from a consideration of the conspectus of the relevant constitutional provisions.

61. It was, however, contended on behalf of the Government that this narrow interpretation of the provision in Clause (1) of Article 222 permitting transfer only with consent would stultify the power of transfer conferred on the President and rob it of its practical content, because by and large no High Court Judge would give his consent to transfer to another High Court. But this apprehension does not appear to be well founded because the history of almost a quarter of century after the commencement of the Constitution shows that during this period no less than 25 High Court Judges were transferred with their consent in exercise of the power conferred under this constitutional provision and it did not remain dormant or sterile. The annexure appended to the affidavit in reply filed by R. Vasudevan, Deputy Secretary to the Government of India, Ministry of Law, Justice and Company Affairs gives, the list of these 25 High Court Judges, some of whom were transferred as

Chief Justices and others as puisne Judges. Then a question was posed on behalf of the Government as to why was it necessary at all to enact a provision like Clause (1) of Article 222, if transfer under it could be made only with the consent of the Judge. But the answer to this question is simple: a judge appointed to a particular High Court could not be transferred to another High Court even with his consent, unless there was a constitutional provision authorising such transfer and hence this provision had to he enacted in Clause (1) of Article 222. Moreover, consultation with the Chief Justice of India was intended to ensure, as far as possible, that the executive should not be able to show favour to a High Court Judge by transferring him, of course with his consent which might be readily given, to a bigger or more convenient High Court or to a High Court where prospects of judicial preferment might be brighter for the Judge. It would be as much destructive of judicial independence to allow the executive to hold out blandishment or show favour to a High Court Judge as to put it within the power of the executive to inflict injury on him and consultation with the Chief Justice of India was intended to act as a check upon it. I think it was Mr. Justice Jackson who said that "judges are more often bribed by their ambition and loyalty than by money". The Chief Justice of India was, therefore, entrusted with the duty to ensure that no favour was shown by the executive in transferring a Judge from one High Court to another so as to place him in a more advantageous position, unless interest of the administration of justice demanded it. Then, it was urged that if such a narrow view was taken as regards the meaning and content of the word 'transfer' in Clause (1) of Article 222, it would become impossible to transfer a Judge whose continuance in a particular High Court to which he is appointed is undesirable on account of doubtful integrity, improper conduct or undue involvement with lawyers and members of the public. Would that not be prejudicial to the interest of administration of justice and hence detrimental to public interest ? Does public interest not require that such a judge should be transferred to another High Court so that he may be put out of harm's way ? Then why should the power to transfer such a Judge be denied altogether, for that would in effect be the position, if transfer were not possible without the consent of the Judge. Now, it is true that there might be some cases where the dictates of public interest might require transfer of a Judge from one High Court to another, but such cases, by their very nature, would be few and far between and I do not think that it would be right, on account of a few such cases, to concede power in the executive to transfer a High Court Judge without his consent which would impinge on the independence of the judiciary. Here there is a competition between two categories of public interest. One is the public interest in seeing that a High Court Judge does not continue to remain at a place where he is polluting the pure fountain of justice and the other is the public interest in securing the independence of the High Court Judiciary from executive control or interference. The latter public interest clearly outweighs the former and if the court has to choose between the two, the latter must obviously be preferred to the former. The transfer of an undesirable Judge may secure public interest and his continued presence in the court from where he is to be transferred may be an evil, but it is necessary to put up with that evil in order to secure the larger good which flows from the independence of the judiciary. I cannot accept a construction which sacrifices the independence of the judiciary in order that it should be possible to transfer a few undesirable judges. The relative benefit to the public interest by transferring a few unworthy incumbents of the office of High Court Judgeship is insignificant compared to the injury to the public interest of the people of India in the independent administration of justice. The public interest in the independence of the judiciary must, therefore, clearly prevail and a construction which subserves this higher public interest must be accepted. The judgment of the court in constitutional issues is essentially a

value-judgment and it has to balance competing values and choose between them, having regard to the comparative Importance or value of the public interest that will thereby be promoted or impaired. The Constitution makers have declared in no uncertain terms that one of the most fundamental public interests shall be fearless justice by an independent judiciary and that public interest must determine the choice of the court and persuade the court to accept a construction which promotes that public interest rather than impairs it.

62. It is no doubt true that by this interpretation, the power of the executive to transfer a High Court Judge would be considerably circumscribed, but the power being of such nature and character that it's improper exercise can gravely imperil the independence of the judiciary which is one of the fore-most concern of the Constitution, it has to be limited in order to prevent its possible abuse or misuse. It is often said by courts that the entrustment of power in the hands of high functionaries of State is itself a guarantee against its abuse, but we have seen in our own times that this power of transfer has been abused by the highest in the land and the so-called safeguard of consultation with the Chief Justice of India has proved to be of no avail. And, as pointed out by the Judicial Committee of the Privy Council in Don John Francis Douglas Livanage and Ors. v. The Queen [1959] 1 A.C. 259: "What is done once, if it be allomed, may be done again". It is a terrifying thought, a frightful possibility, which cannot be allowed to recur if judicial construction can help avert it. Lord Action said with a profound sense of history: "Power corrupts and absolute power corrupts absolutely". The history of the development of supremacy of the rule of law has been a constant struggle between assertion of power on the one hand and efforts to curb and control it on the other. The interpretation which has found favour with me places a limitation on the vast power reposed in the executive and this limitation is necessary-indeed it is fully justified by all recognised canons of construction-in order that the superior Judiciary may be free from executive influence or pressure. Of course, this view would render it almost impossible to transfer an undesirable Judge from one High Court to another, but for that, the remedy is not to read the power conferred on the executive as a power exercisable without the consent of the Judge but to create an independent authority which Is not controlled by the executive and where power is exercised by a plurality of hands and to vest the power of transfer in such independent authority so that it may objectively and impartially examine each individual case of proposed transfer on merits and decide whether the transfer should be made or not and where such provision is made, the consent of the Judge may be specifically dispensed with.

63. That takes me to the next question as to what is the nature and content of "consultation with the Chief Justice of India" which is an essential prerequisite before exercising the power of transfer under Clause (1) of Article 222. On this question, I find myself so entirely in agreement with what has been said by my learned brother Krishna Iyer in his judgment that I do not think I can usefully add anything to it. I wholly endorse what he has said on this point and hold that unless there is previous consultation with the Chief Justice of India of the kind indicated by him in his judgment, the exercise of the power of transfer would be invalid.

64. This brings me to the close of my judgment. It is not necessary to work out the final order in the case in accordance with the view taken in the judgment in regard to the two points raised before us, since as already pointed out in the beginning of the judgment, the parties settled the matter between

them after the arguments were ended and we accordingly passed an order on August 26, 1977 disposing of the appeal in terms of the settlement. Since, however, there was full debate before us and elaborate arguments were advanced on the two points arising for consideration, we decided to give a considered judgment dealing with both the points. This judgment sets out my conclusions on the two points and gives my reasons for reaching those conclusions.

P.N. Krishna Iyer, J.

65. A Judge assailed his transfer by the President of India from one High Court to another on the ground of violation of mandatory norm and sought and got 'nor-transferability' justice from his peers. The Union of India, aggrieved by the statement of law and assessment of fact, has attacked this verdict. Such is the case, capsulated in a couple of sentences but canvassed by counsel at erudite length, the subject of justice to Judges being virgin and the theme of 'lawful illegality' being amenable to imaginative submissions.

66. Two disturbingly vital, potentially portentous problems of Summit Power, are on the brief agenda of constitutional adjudication before us in this appeal by certificate. Despite the diverse points and extreme positions explored at length by the High Court, the case, in its crux and conscience, lends itself to decisive determination by seeking answers to a few interrogations. If the twin questions, which we will presently formulate, are to be satisfactorily settled, the role of judge power and the immunity of the judiciary must be studied with aware allegiance to the Scheme and Sweep of the Constitution with insightful homage to the soul of the Paramount Parchment and with sociological appreciation that our economic and political order, of which the legal order is but a juridical reflection, is sharply pluralist. The apparatuses of activist Justice, working under such societal strains and stresses and charged with engineering progressive change through the law, may have to enjoy more than traditional functional freedom. For, in a dynamic democracy, with goals of transformation set up by the Constitution, the Judge, committee to uphold the founding faiths and fighting creeds of the nation so set forth, has to act heedless of executive hubris, socio-economic pressures and die-hard obscurantism. This occupational heroism, professionally essential, demands the inviolable independence woven around the judiciary by our Constitution. Perfection baffles even the framers of a Constitution, but while on statutory construction of an organic document regulating and coordinating the relations among instrumentalities, the highest Court must remember that law, including the supremalex, is a principled, pragmatic, holistic recipe for the behavioral needs and norms of life in the raw-of individuals, instrumentalities and the play of power and freedom. We strike these deeper prefatory notes since the authorities involved are the President of India, symbolising the executive power of the Union (virtually vested in the Cabinet), the Chief Justice of India who is, in a way, the head of the Indian Justice System and repository of certain strategic functions in the operation of the constitutional complex of checks and balances and a Judge of a High Court, the victim of alleged abuse of 'transfer' power and bearer of the cross for the higher judiciary. The turn for similar 'transferal' treatment may come tomorrow for others too unless the constitutional calculus is authoritatively spelt out by this Court under Article 141. The pathology of power may unpredictably show up unless correctional vigilance makes its constant curial presence felt.

67. We may mention here that as the arguments were drawing to a close, there was a rapprochement move, the political party now in office at the Union level reportedly having repeatedly stated at the 'hustings' to borrow the words of Shri Seervai, counsel for the 1st respondent-that 'transfers' of High Court judges effected by its predecessor-in-power would be cancelled. Pursuant to this policy a statement was made by the learned Attorney General, concurred in by Shri Seervai, that the 1st respondent was proposed to be re-transferred by the President of India and that consequently the relief prayed for was in substance being conceded. Every dispute that ripens into a fruitful, consensual, resolution, ends happily and so, we should have made short shrift of the litigation on a welcome compromise. But we heard counsel on the points covered by the judgment under appeal and so deal with them in fairness to the forensic submissions, the Bench of the High Court and the community at large. Where, under our adversary system, a critical constitutional question arises, whose decision may, perhaps, mark the water-shed between flexible judges and fearless justice, the quality of a litigation is transformed, the particular parties recede and the collective community (we, the People of India) figures invisibly as the beneficiary of the law to be laid down by the final Court. And so, the compounding of the US cannot lull us into treating the subject of 'transfer' of judges under Article 222 a non-issue. This Court has no crystal bail to foretell, nor radar to detect the possible executive interference with the independence of the judiciary by the current or later council of ministers. We affirm the utmost reverence for the human dignitaries in high office but remind ourselves of Lord Action' caveat about power and its tendencies when it is released from the checks and balances the founding fathers have forged. Nor can hortations recognised by the Court because of the common distance between rhetoric and reality, romantics and pragmatics. An independent judiciary as pivotal to democracy is a euphoric proposition and yet, may not, by itself ward off infliction of subtle indignities and little neglects by the Executive on judicial personnel who often smart under invidious distinctions. The supremacy of the judiciary as a senior branch of the State in the important field of justice is a social philosophy, acceptance of which may involve many changes in the way judges at various levels are dealt with vis-a-vis comparable categories in the executive branch including Ministers. Of course, we should make it clear that no claim to be an imperious in imperil can be extended to the judiciary or, for that matter, to any other instrumentality under the Constitution. Nor should Judges be independent of broad accountability to the nation and its indigent and injustice-ridden millions. Moreover, the judicial branch has a responsibility, within its allotted sphere, for the fulfilment of the social, economic and political pledge registered in the Constitution which "We, the People of India" expect to be redeemed. Professor Friedman stated the correct position:

In the modern democratic society the Judge must steer his way between the scylla of subservience to Government and the charydis of remoteness from constantly changing social pressures and economic needs.-Law in a Changing Society (W. Friedmann).

68. The wider amplitude and profound implications of judicial independence may have to be expatiated upon a little later, but suffice it to say, that most Constitutions of the world, Socialist and Capitalist, have made it axiomatic that Judges shall be free and fair and fearless in professional functions. Those who denied it once or doubt it now may live to do it reverence from experience.

69. What falls for consideration in the present appeal is a closer look at the provision for judicial transfers and the content of 'consultation' as set out in the text and context of our Constitution. The construction of Article 222 has to be attempted in this larger setting since it has a grave import for our country's progress in many respects. Not to decide these issues squarely raised in. this appeal merely because of the appellant and the 1st respondent having exchanged assurances, if any, is to leave the jural area in twilight with lamp in hand. Indeed, the issues of semantics and modalities raised in respect of Article 222 and the fairplay implied in its mechanics, where orders constitutionally draped but challenged as expression of executive obliquity, survive even after the exit of this appeal. We, therefore, proceed to formulate the points pressed and discuss the pros and cons.

70. Before that, the facts brevi manu. The 1st respondent (petitioner before the High Court) was appointed a Judge of the High Court of Gujarat as early as 1969. According to the Judge, for suspiciously inscrutable reasons he was transferred by the President of India in exercise of his power under Article 222 in consultation with the Chief Justice of India as recited in the order itself. The Judge felt injured and his misgivings were accentuated by the fact that an unusual number of unwilling Judges from various High Courts were subjected to cross-country transfers, verdicts adverse to the Government on 'Emergency' issues being the apprehended ground for such traumatic hostility. The petitioner-Judge challenged the vires of the Presidential Order and a Full Bench of the High Court held the transfer void. The Union of India has appealed. Unfolding the circumstances and exposing the essentials; the learned Attorney General, appearing for the appellant, side-stepped the fringe issues and zeroed in on the core questions.

71. Before formulating precisely the points on which counsel joined issue, we may state that Shri Seervai gave up the plea of promissory estoppel which had been unsuccessfully urged by him before the High Court. He also stated that the ground of natural justice having been breached, in the sense that the proposal for transfer and the grounds thereof should have been put to the judge concerned, was being abandoned by him although he staked his case on a taller contention that transfer of judges without their consent was unconstitutional. The surviving submissions alone need be itemised.

72. The first emphatic argument of Shri Seervai, which had been concurrently negatived at the High Court level by all the judges on the Full Bench, is that a proper construction of Article 222(1), having realistic regard to the setting and scheme of the Constitution, leads necessarily to the conclusion that 'consultation' with the Chief Justice of India has, as its inescapable component, the securing of the transferee judge's consent to the transfer. The second submission, which led to an equally serious debate at the bar, turned on the textual connotation and contextual content of 'transfer' the meaning, measure and materiality of the expression 'consulation', the pertinence and impertinence of considerations governing the exercise of 'transfer power* over judges under Article 222. What are the modalities, parameters, normal and mechanics of Article 222 so that the purpose of the provision may be fairly, not oppressively, executed by the President, after consulting the Chief Justice?

73. Before we enter on a discussion of these crucial questions, we may record the fact that the learned Attorney General agreed that 'consultation', as contemplated in Article 222, was a high constitutional requirement demanding substantial compliance and not dismissible as an empty formality. It was also conceded by the Attorney General that transfer of judges should be an exception and resorted to only in public interest. Nor was there any dispute about the competence of the Court under Article 226 to exercise its power of judicial review of the Presidential action if there was present any reason within the range of non-consultation, illusory consultation, ulterior purpose or non-application of the mind and the like which may be condensed into (a) breach of the requirements, of Article 222; or (b) mala fide use of the power thereunder.

74. We are mindful that, in the present case, the power of judicial review over administrative action has to be exercised with circumspection and on substantial material-since the authorities are the President (i.e., the Central Cabinet) and the Chief Justice and the adversely affected dramatis personae are judges of the highest courts in the States. Even so, the play must be according to the script and if there is serious deviance, this Court, with responsibility to pronounce upon the law of the land, shall not shrink from it a wee bit, If the examination of the validity of the administrative action exposes breach of a fundamental provision, albeit by the ' highest, or mala fide exercise, however nobly motivated, in either case, the act becomes non est. Public power is a lofty trust to be lawfully operated and, if private impulses or public aberrations play upon the exercise, the court shall quash the lawless fiat. 'A government of laws and not of men' being our basic constitutional theory, absolutism, even benignant, is anathema and administrative action has to be legitimated by legality. 'Be you ever so high, the law (of the Constitution) is above you'. When this Court, discharging its responsibility under Article 141, places an authoritative construction on a spinal provision with impact on the basics of our constitutional dynamics, it may shake or shape the executive/judicative equation, catalyze the constitutional checks and balances and canalyze the free flow of justice. And, if this Court quails or fails, the nation, in the short run or long run, travails. We must state, in considering the conditions of service of the judiciary, we may not be fettered by the past. Nor are British traditions the best nor colonial legacies lustrous, as American and Swiss experiences for instance show. Again, what worked well for half a century may work ill later. The point is that some grounds which appeal to the President as of high pertinence and priority may be allergic to some judges or statesmen; but in a pluralist society, afflicted with medieval cleavages and modern cravings, striving to develop rapidly into a vibrant democracy, the scale of values and the meaning of meanings may vary; and governmental radicalism, if any, needed for socio-economic justice to the millions or subduing divisiveness in the nation may not be voided by judicial review of State policy on the score of unpalatable uncoventionality.. Some of the thought processes bearing on relevance and irrelevance of considerations relating to transfer of judges, as set out in the rejoinder affidavit and as articulated by Shri Seervai in his puissant submissions of impassioned conviction, induce this observation. We do not elaborate save to say this. On policy and strategy the President is the judge. On power and limitations, the judge presides.

75. Even so, the creed of judicial independence is our constitutional 'religion' and, if the Executive use Article 222 to imperil this basic tenet, the Court must 'do or die'. For, when curial justice or judicial freedom is jeopardised by unconstitutional action, what survives? So a balance must be struck. Subject to the major premise or nonnegotiable promise of non-interference with judicial

personnel by methods traumatic or temptational, the rule is clear. The Court could not, even if it would, project its pet aversions to reject progressive policies of Administration even relating to the judiciary; and the Court would not, even if it could, hesitate to hang any overt or covert juggling with the justice system by any hubristic Executive. And when criteria for transfers of judges are put forward by the President which may upset past practices we must, as democrats, remember Learned Hand who once said that the spirit of liberty is 'the spirit which is not too sure that it is right'. That great judge was 'fond of recalling Cromwell's statement: 'I beseech ye in the bowels of Christ, think that ye may be mistaken'. He told a Senate Committee, 'I should like to have that written over the portals of every church, every school and every court-house and may I say of every legislative body in the United States. I should like to have every court begin 'I beseech ye in the bowels of Christ, think that we may be mistaken'. (Yale Law Journal, Vol. 71; 1961 November part).

76. Now to the legal challenges canvassed, freed as we are from the need to make factual findings, thanks to the consensual decretal position. The first problem formulated by us above revolves round our constitutional philosophy and the construction of the language of Article 222. 'Philosophy is a battle against bewitchment of our intelligence by mean's of language' said L. Wittgenstein, in his "Philosophical Investigations'. Mindful of the high sensitivity area of judicial independence versus executive interference, it may be said, as was done by counsel on both sides in this case, that the inviolability of judicial freedom is an obvious value, at once sacred and strategic, but the words of Oliver Wendell Holmes cannot be lost on us: "It is sometimes more important to emphasize the obvious than to elucidate the obscure."

77. We straight go into statutory construction which is of great moment. Article 222 is not the only provision where 'consultation' is obligated with reference to the judiciary by the Constitution. For example, the appointment of judges of the Supreme Court involves the constitutional necessity of 'consultation' as stipulated in Article 124; so also the appointment of judges of High Courts (Article 217). Coming further down to the subordinate judiciary-indeed, the common man is more concerned as consumer of equal justice at the hands of the local courts of the country-Article 233 mandates 'Consultation' by the Governor of the State with the High Court concerned. We do not seek to be exhaustive, but exemplify that the independence-imperative vis-a-vis the courts is effectuated by the consultative component in any decision seriously affecting the appointment, conditions of service and kindred matters bearing on the judiciary at various levels. The pervasive importance of our ruling on the question before us is thus clear. Statutory interpretation of one clause may, in a sense, affect the fasciculus of 'judicial' clauses in the various parts of the Constitution. We are free to concede, however, that the extent, nature and process of consultation may vary to a degree, depending on the responsible levels, high functionaries, other protective provisions and like factOrs. Whether it extends to consent of the judge concerned is another matter we have to decide, as Sri Seervai has been at great pains to 'proselytise' us to his viewpoint, if we may appreciatively put it that way.

78. Proceeding to decide a constitutional clause in an organic code, our juristic technique has to be perceptive spacious, creative, hot narrowly grammatical, lexicographically pedantic or traditionally blinkered, informed by Lord Denning's picturesque words:

Law does not stand still. It moves continually. Once this is recognised, then the task of the Judge is put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time. He must not be a mere mechanic, a mere working mason, laying brick on * brick, without thought to the overall design. He must be an architect-thinking of the structure as a whole-building for society a system of law which is strong, durable and just. It is on his work that civilised society itself depends.

(Denning, M.R. Foreword to the Supreme Court of India (A socio-legal critique of its juristic techniques)-by Rajeev Dhavan.

Shri Seervai drew our attention to the constellation of provisions which served as 'hands off judges' clauses. This armour has counterparts in the Government of India Act, 1935. For instance, to borrow from the 1st respondent's neat statement of the case,

(a) Judges of the High Court hold their tenure not at the pleasure of the President but till they attain the age of 62 years: Article 217(1): [Section 220(2), G.I. Act, 35].

(b) Their salaries and allowances are charged on the Consolidated Fund of the State: Article 203(3)(d) [Section 78(3)(d) G.I. Act, 35] so that under Article 203(1) they are not subject to a vote of the Legislative Assembly: [Section 79(1), G.I. Act, 35]

(c) The pensions of High Court judges are charged on the Consolidated Fund of India: Article 112(3)(d)(iii) [Section 33(3)(d), G.I. Act, 35] so that under Article 113(3) such pensions are not subject to the vote of Parliament. [Section 34(1), G.I. Act, 35]. Further, under Article 221(2), "neither the allowance of a judge nor iris rights in respect of leave of absence or pension are to be varied to his disadvantage after his appointment" [Sec 221, proviso, G.I. Act, 35] Since the salaries payable to the judges are prescribed by Schedule II of the Constitution, they could not be varied without an amendment of the Constitution.

(d) Article 211 prohibits any discussion in the Legislature of a State with respect to the conduct of any judge of the Supreme Court or of a High Court in the discharge of his duties (Emphasis supplied): [Section 40(1), G.I. Act, 35]

(e) Article 215 confer upon the High Court a power to punish for contempt of itself.

(f) The provisions of Article 211 show that the judges are protected from criticism of their judicial acts from the Legislature, which is a political assembly and the provisions of Article 215 show that the High Court has power to protect itself against interference in the course of administration of justice from whatever quarter it may come.

(g) Under the general law of Civil liability (Tort) words spoken or written in the discharge of his judicial duties by a judge of the High Court are absolutely privileged and no action for defamation can lie in respect of such words. This absolute immunity is conferred on the judges on the ground of public policy, namely, that they can thereby discharge their duty fearlessly.

(h) The form of oath prescribed in the 3rd Schedule for a Chief Justice or a Judge of the High Court emphasises the absolute necessity for judicial independence if the oath is to be adhered to, because it requires the judge to swear that he will perform the duties of his office "without fear or favour, affection or illwill." (Emphasis supplied). These words have been added to the form of the judge's oath prescribed by the G.I. Act 35, Schedule IV, 2.

(i) The independence of the High Court is emphasised by Article 229 which provides that appointments of officers and servants shall be made by the Chief Justice or such other judge or officer as he may appoint.

(j) Article 50, which is a directive of State Policy, directs the State to take steps to separate the judiciary from the executive in the public services of the State, thus emphasising the need of securing the judiciary from interference by the executive.

79. These provisions do not stand alone. Chapter V of Part VII of the Constitution deals with High Courts in the States. Chapter VI deals with subordinate Courts and Articles 233 and 235, as judicially interpreted provide that in respect of promotion, transfer and disciplinary action, the subordinate judiciary are under the full control of the High Court and not of the executive government in order to secure judicial independence. Originally, the Constitution used the word "posting" in Article 235. In order to preserve judicial independence the word "posting" was interpreted to mean an original appointment and not to include a transfer: Ranga Mahommad's case (1967) 1 S.C.R. 454. This interpretation was accepted by Parliament when it inserted Article 233A which was inserted by the Constitution 20th Amendment Act, 1960, validating certain appointments and recognizing the distinction between "posting" and "transfer" in Sub-clause (a) (ii) of Article 233A."

80. These muniments highlight the concern of the founding fathers for judicial insulation, a sort of Monroe doctrine. Against this background we must read Article 222. The doctrinal basis is clear. Are the words also clear ? If yes, no difficulty presents itself, if no, actual legislative history and accepted constitutional theory, it is contended, may form part of extrinsic aid, as a tool to remove ambiguity. This plunges us into the problematic of constitutional interpretation.

81. The detailed debate at the bar on canons of statutory construction persuades us to essay a consideration of their essentials to the extent necessary here. It is neither an illogical nor a starting proposition that one of the components of understanding and interpretation in law as in art is the content within and without the Act or work in which the particular words in question appear. British judicial thinking is reflected in many rulings one of which may be referred to here. Viscount Simonds in Attorney-General v. Prince-Ernest. Augustus of Hanover (1957 AC 436) stated at p. 461:

For words and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context and I use 'context' in its widest sense, which I have already indicated as including not only other enacting ' provisions of the same statute, but its preamble, the existing state of the law other statutes in pari materia and the mischief which I can, by those and other legitimate

means, discern the statute was intended to remedy.

Since a large and ever-increasing amount of the time of the courts has, during the last three hundred years, been spent in the interpretation and exposition of statutes, it is natural enough that in a matter so complex the guiding principles should be stated in different language and with such varying emphasis on different aspects of the problem that support of high authority may be found for general and apparently irreconcilable propositions. I shall endeavour not to add to their number, though I must admit to a consciousness of inadequacy if I am invited to interpret any part of any statute without a knowledge of its context in the fullest sense of that word.

(Emphasis supplied) Lord Normand expressed the idea thus, at p. 465:

In order to discover the intention of Parliament it is proper that the court should read the whole Act, inform itself of the legal context of the Act, including Acts so related to it that they may throw light upon its meaning and of the factual context, such as the mischief to be remedied and those circumstances which Parliament had in view, including in this case the death of the last of Queen Anne's Children and the state of the family of the Princess Sophia. It is the merest commonplace to say that words abstracted from context may be meaningless or misleading.

Primarily, the key to the opening of every law is the reason and spirit of the law-it is the animus impotent is the intention of the lawmaker, expressed in the law itself, taken as a whole. We must also notice that not much is gained by the caution that where a word is ambiguous extraneous aids can be used, because an ex facie unambiguous word may acquire one of many alternative shades of meaning given a statutory setting. John Dewey is right (as quoted by Reed Dickerson):

Dewey, although conceding that 'no term has logical force save in distinction from and relation to other terms', adds:

This statement is not contradicted by the fact that all familiar words carry some meaning even when uttered in isolation...(T) heir meaning is potential rather than actual until they are linked to other words. If the words sun, parabola, Julius Caesar, etc., are uttered, a line of direction is given to observation or discourse. But, the objective of the direction is indeterminate until it is distinguished from alternative possible terminations and is thus identified by means of relation to another term.

(J. Dewey, Logic: The Theory of Inquiry 349 (1938) Emphasis in original). (p. 50, Dickerson) As Allen points out, words are meaningless in isolation although it may be offset by a footnote thought that even when read out of specific context, particular words and phrases retain much of the flavour of their usual associations. In view of these divergences 'it is a delicate business to base speculations about the purpose or construction of a statute upon the vicissitudes of its passage. (Holmes J in Pine Hill Coal Co. v. United States: 259 U.S. 191, 196. Even so, we agree with the emphasis laid by Shri Seervai on the ruling in River Wear Commissioners v. Adamson 2 App. Cas. 743, HL 1877:

...(W)e are to ...(give) the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention

could not have been to use them in their ordinary signification, which though less proper, is one which the Court thinks the words will bear.

82. This Court has veered to the view that whatever is logically relevant is legally look-at-able. See: State of Mysore v. R.V. Bidap and Dattaraya Govind Mahajan v. State of Maharashtra (1977)2 SCC 548. Truth is not a cloistered virtue but carefully to be located. The universe of meaning is not a soundproof system nor a noisy babel. We have guidelines, not rituals. The rule is not, always literality, for that sounds like bigotry. Nor is it whatever the interpreter chases, like historicity, sociology, conceptuality and a host of fancy-dress fashions, for that will create unwarranted variances and supersede the law-maker by a side-wind. Words used designedly by trained draftsmen and authenticated by purposeful legislators, must possess a mandate, a meaning and a mission. That is its sense.

83. Therefore, we are inclined to the view that legislative history plus, within circumspect limits, may be consulted by courts to resolve ambiguities, warning themselves that the easy abuses of legislative history and like matrix material may lead to the vice of occult uncertainty and wresting of legislative power from where it belongs. (See Reed Dickerson Ch. 10 on 'The Uses and Abuses of Legislative History). The history of events transpiring during the process of enacting an act has generally been the first extrinsic aid to which courts have turned in attempting to construe an ambiguous act, (Sutherland $ 48.04). It may be reasonable to accept the statement of Mr. Justice Jackson in Schwegmann Bros v. Calvert Distillers Corporation 341 U.S. 384, 395-397:

By and large, I think our function was well stated by Mr. Justice Holmes: 'We do not inquire what the legislature meant; we ask only what the statute means." . . . And I can think of no better example of legislative history that is unedifying and unilluminating than that of the Act before us.

(Dickerson, p. 163) Similar is Frankfurters' three-fold imperative to students: "(1) Read the statute; (2) Read the statute, (3) Read the statute!" Attributed to H Friendly Benchmarks 202 (1967-Dickerson, p. 217).

84. We have said enough to indicate that an attempt to be exhaustive about the canons of interpretation and application of statutes is a journey through a jungle. Nevertheless, while understanding and interpreting a statute, a fortiori a constitutional code; the roots of the past, the foliage of the present and the seeds of the future must be within the ken of the activist judge. Curtis has contended that, consistently with the ascertained meaning of the statute, a court should be able to shake off the dust of the past and plant its feet firmly in the present:

...The legislature which passed the statute has adjourned and its members gone home to their constituents or to a long rest from all law-making. So why bother about what they intended or what they would have done ? Better the prophetic than archeological, better deal with the future than with the past, better pay a decent respect for a future legislature than stand in awe of one that has folded up its papers and joined friends at the country clubs or In the cemetry ...

[C. Curtis, A Better Theory of Legal Interpretation, 3 Vand L. Rev. 407, 415 (1950), rephrased in It's Your Law 54, 55 (1954)] (Dickerson, p. 245)

85. While we agree that judicial interpretation should not be imprisoned in verbalism and words lose their thrust when read in vacuo, we must search for a reliable scientific method of discovery rather than the speculative quest for the spirit of the statute and the cross-thoughts from legislators' lips or Law Commissioner's pens. They edify but are not edictal.

86. In Hutton v. Phillips, the Supreme Court of Delaware threw useful light on the use of contextual and environmental background to correct construction of statutes:

...(Interpretation) involves far more than picking out dictionary definition of words or expressions used. Consideration of the context and the setting is indispensable properly to ascertain a meaning. In saying that a verbal expression is plain or unambiguous, we mean little more than that we are convinced that virtually anyone competent to understand it and desiring fairly and impartially to ascertain its signification, would attribute to the expression in its context a meaning such as the one we derive, rather than any other; and would consider any different meaning, by comparison, strained, or far-fetched, or unusual, or unlikely.

. . .Implicit in the finding of a plain, clear meaning of an expression in its context, is a finding that such meaning is rational and 'makes sense' in that context.

[45 Del. 156-70 A. 2d 15 (1949)] "An explanatory tale should not wag a statutory dog" (Attributed to Jones, C.J. in A.P. Green Export Co. v. United States 284 F. 2d 383, 386 (Dickerson, p. 137). True. But 'the meaning of some words in a statute may be enlarged or restricted in order to harmonize them with the legislative intent of the entire statute... It is the spirit... of the statute which should govern over the literal meaning...' (Hanley, J., in Town of Menomlnee v. Skubits. 53 Wis. 2d 430, 437 (Dickerson p. 198). Labels like strict or liberal construction or totems like 'context', 'spirit', 'cognitive' and 'creative' do not solve the problem. The only way we may scientifically approach the interpretative problem raised in this case is to show deep reverence to the lovely sum-up by Benjamin Cardozo:

We may figure the task of the judge, if we please, as the task of a translator, the reading of signs and symbols given from without. None the less we will not be set men to such a task, unless they have absorbed the spirit and have filled themselves with a love, of the language they must read.

(The Nature of the Judicial Process: Yale University Press)

87. To set the record straight we must reiterate what Cradles has stated with classical purity:

If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver.

Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature.

(Statute Law 6th Edition, p. 66)

88. Our basic task now is simplified because the issues and themes "that have fallen for discussion demand an application to the concrete situation of the general principles bearing on statutory construction we have put down in variegated colours. But, before that, in the spirit of what we have said, we may refer to a fundamental consideration which must be regarded almost as inspirational in the art of interpretation of a Constitution when the clauses to be construed are so cardinal as to affect the basic structure of the national charter, viz., the independence of the judiciary. To dissect a constitutional provision meticulously as if it were a cadaver is to miss the life of the charter we are expounding. To change the metaphor, then the arrow hits a mark 'the archer never meant'.

89. Shri Seervai set tremendous store by the contention that Article 217(1), proviso (c), Article 222 and a family of 'judicial' articles dealing with the superior court judges, including the items in schedule III relating to Form of Oath prescribed for judges, highlight the sacrosanct character of the infrastructure constructed by the Constitution as the delivery system of justice. The Chapter on 'subordinate judiciary' was also touched upon.

90. Shri Gupte, the learned Attorney General, assured the Court that he and his client were second to none in upholding the independence of the judiciary but contended that the doctrine could not be pressed in its extreme form to undermine a clear power vested in the President. To do so would be to defeat the intent and purpose of the Article by the covert process of construction. Indeed, he went on to state that there was no contradiction between the power to transfer, under Article 222 and the insulation of the judiciary from the tantrums and allurements of the Executive. This controversy takes us to the pivotal role of judicial independence in our constitutional scheme and its impact on the terms of Article 222(1).

91. We have not the slightest doubt that, having regard to the enormous undertakings a Welfare State, such as is envisioned in our Constitution, has to launch upon, government and government controlled institutions becomes litigants in a variety of ways in the courts of the country. And, if a litigant has, in another capacity, power of transfer over the Court, the situation is apt to become murky unless the constitutional lines for the play of that power are clearly drawn and the highest Court in the land holds the Executive within the leading strings of constitutional limitations. Power, Executive power in enormous measure, vests in the President and in the Cabinet system and in the parliamentary model of the Westminster type, the legislature often accepts the lead of the Council of Ministers. Naturally, the two branches of the State so intertwined may present a concentration of power the use of which has to be carefully monitored so that justice to the citizen as against the State, justice to the State as against the Union and justice to the community where men in high office are arraigned, may not fail in court. The confidence of the people in the fearless, flawless administration of justice is of a supreme importance for the survival of democracy and the progress of the nation.

92. We now move on to the doctrinal debate and a valid resolution of the rival views. The) spiritual value of a free judiciary for a civilised human order is symbolised in the imperative Fiat Justicia and inscribed in ancient Indian Neeti Shastras. To us of a constitutional culture rooted in the supremacy of justice-social, economic and political-and subjected to colonial injustice before we became free, independence of the judiciary is no speculative nicety nor sweet novelty but a dear creed to defend liberty. But this noble precept must be perceived as part of and not paramount to the ensemble of values which makes a people free. It is not as if judicial independence is an absolute end overriding the people's well-being. 'Nothing is more certain in a modern society', declared the U.S. Supreme Court at mid-century, 'than the principle that there are no absolutes'. The world of law, like that of physics, was perceived only as the relativity of one value compared with another." (Schwartz, p. 269-70). This relativity is inevitable in a changing society like ours. Even in America 'the old justice in the economic field (affirmed John Dewey) consisted chiefly in securing to each individual his rights of property or contracts. The new justice must consider how it can secure for each individual a standard of living and such a share in the values of civilisation as shall make possible a full moral life." (Schwartz, p. 271). The nostalgic image of celestial justices wearing 'independent' ermine, unsullied by the dusty soil 'where the tiller is tilling the hard ground and where the pathmaker is breaking stones' will be rebuffed by Justice, social and economic, with the reproof in the Gitanjali: 'Put off thy holy mantle . . . come out of thy meditations . . . Meet him and stand by him in toil and in sweat of thy brow'. The point is that Deliverance of the People is the basic vision; Justice fills that vision with life when, in. terms of the Institutes of Justinian, it 'is the constant and perpetual wish to render to every man his due'; and independence of the justices is a necessary means to that endless end and, contrary thereto, if Judges declare for themselves socially untenable 'independence' of the interests of 'the People of India' the picture gets distorted. This perspective illumines the nation's charter which invests judges with power. To idealise independence of the judges beyond the profile of the Constitution is to self-colonise our country's life-style. And, Bejamin Cardozo has, with beautiful bluntness, expressed how the sub-conscious forces and social philosophies of judges hold their minds captive:

Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them-inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs a sense, in James' phrase, of 'the total push and pressure of the cosmos' which, when reasons are nicely balanced, must determine where the choice shall fall.

(Nature of the Judicial Process, p. 12) This divagatory discussion is, in a sense, fundamental to the resolution of the conflict between the broader presentation of the problem by the learned Attorney General and the relentless philosophical insistence of Sree Seervai. * Why ? Executive interference is one menace. Judicial prepossessions and prejudices wearing liberal masks, may be another. Mob and media hysteria can be a third. The Roman Emperor did not dictate the injustice of crucifixion which Pontius Pilate decreed. Nor was the Dred Scott decision, which dehumanised the black millions, the product of unfree justices. And yet, history has pronounced with blood these independent judges guilty.

93. The truth is that at a time of Hamlet's choice of "To be or not to be" for hundreds of millions of Indian humans, independent justice has a paramount 'public interest' connotation. Within this larger framework of common-weal and conducive to that object, we must conceive the ideology of the independence of the judiciary. Once this major premise granted, 'hands off 'judges' is too sacred to be sacrified. For corrosion of the court's authority conscientiously to adjudicate, undaunted by executive displeasure or other forms of pressure, is the subversion of the surest institutional guarantee of life, liberty and the pursuit of happiness.

94. We agree broadly with the learned Attorney General that where the first principle of justice to the community is contradicted by the continuance of the judge in a particular State, the 'independence' principle will have to be harmonized with the cause of compelling public interest. Indeed, the independence of the judiciary is itself a necessitous desideratum of public interest and so interference with it is impermissible except where other considerations of public interest are so strong and so exercised as not to militate seriously against the free flow of public justice. Such a balanced blend is the happy solution of a delicate, complex, subtle, yet challenging issue which bears on human rights and human justice. We agree with Sri Seervai that the plea that some judges are corrupt and therefore the Executive must have the power to put any judge out of a State is a remedy that aggravates the malady. It is a balancing of evils. And, it" judicial vice at that level is negligible and gently manageable, why temporise on a priceless value ? A few scapegraces among justices, cannot be an alibi for making the whole judicature scapegoat.

95. The nature of the judicial process is such that under coercive winds the flame of justice flickers, faints and fades. The still small, voice is smoothened by subjective tribulations and anxieties and, if coerced, trembles to objectify law and justice. The true judge is one whose soul is beyond purchase by threat or temptation, popularity or prospects. To float with the tide is easy; to counter the counterfeit current is uneasy. And yet the judge must be ready for it, if needed. By habit and training, by the open process of 'adversary' hearing and ordinary obligation for written reasoning, by the moral fibre of his peers and elevating tradition of his profession, the judge develops a stream of tendency to function 'without fear or favour, affection or illwill', taking care, of course, to outgrow his prejudices and weaknesses, to read the eternal verities and enduring values and to project and promote the economic, political and social philosophy of the Constitution to uphold which his oath enjoins him. But it is sense to treat the person who wears the robes as human, with failings and falterings and affected by the 'total push and pressure of the cosmos'. And so, environmental protection of the judicial echelons from Executive influence, by transfer or other deterrent, is in public interest. But to promote the community's concern for impeccable litigative justice, policy-oriented transfer of judges after compliance with constitutionally spelt-out protocols may not be ruled out.

96. It was right of Sri Seervai to have spread the canvas wide since the appreciation of this pivotal issue of the judge's matter and methods demands acceptance of the broader bearings and constitutional culture. We here construe not merely Article 222 but lay down the larger law of the Constitution. We must first understand that judges have been assigned, by the supreme lex, an independent sentinel's duty. To defeat this role subtly or crudely is to rob the Constitution of a vital value. So it is that we must emphatically state a judge is not a government servant but a

constitutional functionary. He stands in a different category. He cannot be equated with other 'services' although for convenience certain rules applicable to the latter may, within limits, apply to the former. Imagine a judge's leave and pension being made precariously dependent on the Executive's pleasure. To make the government-not the State-the employer of a superior court judge is to unwrite the Constitution. To conclude on this branch, we cannot tear off the text of Article 222 and put it under a microscope but must master the scheme and setting and describing the meaning beyond the political sunrises and sunsets of passing seasons. Indeed, the spiritual quiet and spiritual quest of the judge's toils lies here. We may listen to Chief Justice Hidayatullah's chastening words:

One must, of course, take note of the synthesised authoritative content or the moral meaning of the underlying principle of the prescriptions of law, but not ignore the historic evolution of the law itself or how it was connected in its changing moods with the social requirements of a particular age. p>5

97. Sri Seervai called attention to other articles, the form of oath prescribed for judges, the need for oath while assuming office on transfer etc., to support his main plea. We do not think that this submission advances his case further. Even so, we will briefly examine the merits of the submission. 'Transfer', according to Sri Seervai, is used in this Chapter, as taking colour from 'appointment'. Appointment to a post or office can be only by consent and so, if transfer partakes of the element of appointment, consent of the transferee is necessary.

98. In 'service' vocabulary, familiar to the Constitution framers, the concepts of appointment and transfer are clear. But Shri Seervai took as through many articles to suggest that either 'transfer' was used in the company of 'appointment' or in such other milieu as to limit the former to cases of consent transfer. He also invoked the rule of nosciteru social to impart a consentaneous flavour to 'transfer'. Captivating, not convincing, is our short comment.

99. The basic assumption, with which, in the abstract, no one can quarrel, is that appointments can be made not by conscription but by willingness of the appointee and founded or this concept attempt was made to bring in the component of 'appointment' in every 'transfer'.

100. Article 216 was pressed into service to make out that a High Court consisted of a Chief Justice and only such other judges as were appointed. Therefore, if a transferee judge was to become part of the High Court he had to be appointed. Article 217 was read to suggest with special reference to proviso (e) to Article 217(1) that even as the office of the judge of a High Court shall be vacated by his being appointed to be a judge of the Supreme Court-this could be done only with the consent of the judge concerned since nobody could be forced into judgeship of the Supreme Court-so also, vacancy could be caused by transfer to any other High Court only if it were with consent. A case of transfusion of sense, as it were. It was further stressed that Article 219 stipulated the necessity for oath of office being taken before a judge entered upon his office. Such an oath was taken with special reference to the High Court where he was becoming a judge. Therefore, on transfer to another State High Court a fresh oath was necessary and the form of oath spoke of appointment, not transfer. From this it was sought to be inferred that a judge, on transfer, had to be appointed to another High Court. A few more of such somewhat finical instances were picked out and scanned at the micro-level to broad-base the theory that 'transfer' in the scheme of Chapter VI Part V covered only

such shifts as were concurred in by the transferee. Having given close thought to the thesis, presented with an eye on * Judicial Methods by M. Hidayatullah, C.J. at p.45 detail and woven into a fine web, we are not inclined to agree that the plain meaning of transfer under Article 222 can be whittled down in the manner suggested. To be subtle may not always be to be sound. The learned Attorney-General explained that Article 216 merely set out the Constitution of the court as including the Chief Justice and such other judges as the President chose to appoint. The contradistinction between 'appoint' and 'transfer' did not arise in the situation. Likewise, proviso (e) to Article 217(1) covered two separate categories and two separate situations giving rise to vacancy in the Office of Judge of a High Court. The first was when a High Court judge was appointed to the Supreme Court; the second was when he was transferred to any other High Court. To telescope, the two to deduce the common element of consent was to mix up two distinct categories without any warrant. On the other hand, the use in the Constitution of the two words 'appoint' and 'transfer'' separately brings into bold relief the distinction between the compulsory process of transfer and the voluntary acceptance needed for an appointment. The learned Attorney-General was inclined to urge that technically a fresh oath was not even necessary when a judge was transferred from one High Court to another. Perhaps the form of oath specifies the High Court and, therefore, a transfer may necessitate a second oath with reference to the transferee High Court. Even so, that does not tell upon the construction of the expression 'transfer'.

101. A few other factors contradicting the notion that fresh appointment was implied in every transfer were highlighted by the learned Attorney-General. Minor verbal vagaries, [see Schedule II Part IV (11)] even if discovered were inconsequential where the thrust of the particular provision was strengthened by other considerations,

102. If the transfer of a judge is tantamount to his de novo appointment, a second time, there should be consultation with the Chief Justice and the government of the State to which he is transferred. Article 222 does not visualise such second consultation and neither side has a case that such protocol was adhered to ever before. Nor is a fresh warrant of appointment issued. Secondly, the Government of India Act, 1935 and the draft Constitution did not provide for transfer of judges but only their appointment in any other High Court. Then why did the makers of the Constitution deliberately depart specially to include the provision for transfer unless it be that it was meant to vest this additional power in sharp contrast to the earlier limited power to appoint in another High Court ? Thirdly, whenever consent of the judge is contemplated, it is specifically stated e.g. Article 224A and its omission in Article 222 is a pointer to the nonconsensual sense. And when a constitutional provision, introduced by design and unambiguous in 'service' terminology, falls for construction, instruction about the setting is useful but interpretation by the judges to undo what was done by the authors is not right. We agree.

103. At this stage we may read and decode the concerned Article and deal with the matter in greater detail.

104. Article 222 of the Constitution runs thus:

Transfer of a Judge from one High Court to another:

(1) The President may, after consultation with the Chief Justice of India transfer a Judge from one High Court to another High Court.

(2) When a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix.

105. The key words in this Article are 'consultation' and 'transfer'. What is consultation, dictionary-wise and popular parlance-wise? It implies taking counsel, seeking advice. An element of deliberation together is also read into the concept. "To consult" is to apply to for guidance, direction or authentic information, to ask the advice of- as to consult a lawyer; to discuss something together; to deliberate." Hewey v. Metropolitan Life Ins. Co. 62 A. 600,602,100 Ne. 523 The word "consult" means to seek the opinion or advice of another; to take counsel; to deliberate together; to confer; to apply for information or instruction. C.I.R. v. John A. Wathen Distillery Co., C.C.A. 147 F. 2d 998, 1001.... "Consult" means to seek opinion or advice of another, to take counsel; to deliberate together; to confer; to deliberate on; to discuss; to take counsel to bring about; devise; contrive; to ask advice of; to seek the information of; to apply to for information or instruction; to refer to. Teptitsky v. City of New York 133 N.Y.S. 2d 260, 261"-Words and Phrases-Permanent Edition-Volume 9 Page 3

106. Sfroud's Law Lexicon defines 'consultation' thus:

CONSULTATION, [New Towns Act, 1946 (9 & 10 Geo. 6, c. 68), Section 1(1)], "consultation with any local authorities." "Consultation means that, on the one side, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given "to the local authority to tender advice" per Bucknill, L.J., in Rollo v. Minister of Town and Country Planning, [1948] 1 All E.R. 13 C.A.; see also Fletcher v. Minister of Town and Country Planning, [1947] 2 All E.R. 949.

We consult a physician or a lawyer, an engineer or an architect and thereby we mean not casual but serious, deliberate seeking of informed advice, competent guidance and considered opinion. Necessarily, all the materials in the possession of one who consults must be unreserved-fly placed before the consulted. Further, a reasonable opportunity for getting information, taking other steps and getting prepared for tendering effective and meaningful advice must be given to him. The consultant, in turn, must take the matter seriously since the subject is of grave importance. The parties affected are high-level functionaries and the impact of erroneous judgment can be calamitous. Therefore, it follows that the President must communicate to the Chief Justice all the material he has and the course he proposes. The Chief Justice, in turn, must collect necessary information through responsible channels or directly, acquaint himself with the requisite data, deliberate on the information he possesses and proceed in the interests of the administration of justice to give the President such counsel of action as he thinks will further the public interest, especially the cause of the justice system. However, consultation is different from consentaneity. They may discuss but may disagree; they may confer but may not concur. And in any case the

consent of the Judge involved is not a factor specifically within the range of Article 222.

107. The expression 'transfer', as we have already indicated, in the context of service jurisprudence is not limited to consensual transfer. A. transfers B. when he has the power to shift him from one place to another or from one position to another. Intrinsically, in its transitive use, it does not imply the consent of the transferee. Of course, in appropriate cases such consent may be a justifiable course or desirable in the circumstances. We may visualise situations where seeking the consent of the potential transferee may be a self-defeating operation. We need not explore these aspects but may conclude that terminologically or in the spirit of the provision, it is not right to insist that 'transfer' has, as one of its components the consent of the transferee or even of the Chief Justice of India. The risk of rejecting the mature and specialised counsel of the Chief Justice is not far to seek.

108. It would be seen that there is absolutely no provision in this Article requiring the consent of the Judges of the High Court before transferring them from one High Court to another. Indeed, if the intention was that such transfers could be made only with the consent of the Judges then we should have expected a proviso to Article 222(1) in some such terms as:

Provided no Judge shall be transferred from one High Court to another without his consent.

The absence of such a provision shows that the founding fathers of the Constitution did not intend to restrict the transfer of Judges only with their consent. It is difficult to impose limitations on the constitutional provisions as contained in Article 222 by importing the concept of consent which is conspicuously absent therefrom. It has already been pointed out above that the Government of India Act, 1935 did not contain any provision for transfer which was effectuated by appointing a Judge of one High Court as a Judge of another High Court. The draft Constitution also contained no such provision for transfer but when the Constitution was finally passed it seems to us that it must have dawned on the founding* fathers of the Constitution who were men of learning and foresight, eminent jurists and legal luminaries, that every possible situation of conceivable contingency must be covered and provided for. It was therefore that an express provision for transfer of Judges was incorporated in Article 222(1) of the Constitution.

109. There is yet another aspect of the matter. As indicated above, the Attorney-General fairly conceded that the transfer of Judges under Article 222 was an unusual step and could be made only in public interest which would include compelling administrative exigencies, interest of the Judges themselves and such other factOrs. If consent is imported in Article 222 so as to make it a condition precedent to transfer a Judge from one High Court to another then a Judge, by withholding consent, could render the power contained in Article 222 wholly ineffective and nugatory. It would thus be impossible to transfer a Judge if he does not give his consent even though he may have great personal interests or close associations in his own State or by his conduct he brings about a stalemate in the judicial administration where the Chief Justice would become more or less powerless. In our opinion, the founding fathers of the Constitution could not have contemplated such a situation at all. That is why Article 222 was meant to take care of such contingencies. It was suggested by Mr. Seervai that if a Judge misbehaved, he could be impeached according to the provisions of the Constitution rather than transferred by way of punishment. This argument fails to

consider the practical aspects of the matter. It is not every misbehavior or misconduct which may be sufficient to impeach a Judge and indeed it would be difficult to prove such misconduct or misbehavior in the manner provided by the Constitution in a large variety of cases. Principled pragmatism is the soul of policy. The very fact that by withholding consent the Judge is in a position to reduce Article 222 to a dead letter so as to deprive it of potency, clearly shows that the Constitution makers never intended to make redundant provisions.

110. Viscount Simon, L.C. in the case of Nokes v. Doncaster Amalgamated Collieries Ltd. 1940 A.C. 1014 observed as follows:

If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.

For these reasons it is not possible for us to read the word 'consent' in Article 222 on a construction of the plain and unambiguous language of the Article. As earlier noticed it was contended by Mr. Seervai that the Constitution contains provisions in order to show the independence of the judiciary and if we imply consent in Article 222 it will be in keeping with the spirit of the Constitution. We are, however, unable to agree with this argument. A provision empowering the President to transfer a Judge from one High Court to another can in no way be regarded as marring the independence of the judiciary, given the gloss we have given to it. It will be noticed that the power under Article 222 is hedged in by several safeguards. In the first place, the power 8-930SCI/77 rests in such a high authority as the President who acts on the advice of the Council of Ministers; secondly, the power can be exercised only in consultation with the Chief Justice of India who is the highest judicial authority of the country. We have already indicated that consultation as contemplated by Article 222 is not an empty ritual or an idle formality but is a matter of moment and must be fully effective. We shall advert to this aspect later. In view of the valuable safeguards laid down by the Constitution itself, the argument of Mr. Seervai that the power is capable of being misused cannot compel us to interpret Article 222 by ignoring the well settled rules of interpretation and as has been said, by playing the role not of a Judge but of a legislator.

111. It was then argued by Mr. Seervai that just as in Article 217(1) which provides for appointment of a High Court Judge consent of the Judge is not expressly mentioned in the Constitution, but has to be implied because no Judge can be appointed without his consent, on a parity of reasoning the same should be said of Article 222(1). The argument, however, suffers from a serious fallacy. In the first place, there is a well recognised distinction between appointment and transfer. Appointment means an initial entry into service for the first time and no body can be compelled to joint or enter a particular service against his consent. In these circumstances, therefore, appointment in the very nature of things implies express consent of the appointee. The same cannot be said of a transfer after a person is appointed to a service because transfer is an incident of service. Once a person, has entered service he is bound by the conditions imposed either by the Service Rules or the Constitutional provisions. No person after having joined the service can be heard to say that he shall not be transferred from one place to another in the same service without his consent. Having

accepted the service the functionary has no choice left in the administrative action that can be taken by empowered authorities, namely, transfer from one place to another, assignment of work and likewise. Thirdly, it would appear that Article 217 under which a Judge is appointed appear in the Constitution well before Article 222. A Judge of the High Court when he accepts an appointment is fully aware of Article 222 under which he can be transferred from one High Court to another and if being fully conscious of Article 222 he accepts the appointment as a Judge, of the High Court he cannot be heard to say that he cannot be transferred without his consent. In these circumstances, therefore, we are unable to agree with Mr. Seervai that the terms appointment and transfer as used in the Constitution are interchangeable terms conveying the same meaning. On the other hand, Article 217(1)(c) runs thus:

The office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

It would be seen that in this constitutional provision the words "appointed" and "transferred" have been used separately conveying different connotations; and if the Constitution makers had used these two terms in the said subject in different contexts it cannot be argued that these two terms are interchangeable. On the other hand, an analysis of Article 217(1)(c) shows that the constitutional provision makes a clear-cut distinction between appointment and transfer. Similar arguments were also advanced by the respondents regarding the requirement of an oath as contained in Article 219 and it was contended that because a transferee Judge has to take an oath, it is really an appointment and not a transfer. Article 219 merely requires a person who is so appointed as Judge of the High Court to make and subscribe oath before the Governor of the State, or some person appointed in that behalf by him. Technically speaking, once a Judge has taken an oath of appointment as a Judge of the High Court he continues to be a Judge until he attains the age of sixty-two years or is removed, resins or dies. The oath taken by him continues until these contingencies. Thus, when a Judge is transferred the office which he vacates is not the entire office of the High Court Judge but only that part of the office which he had been holding as a Judge of a particular Court. Strictly speaking, therefore, when a Judge is transferred from one High Court to another under the clear sanction of law, namely, Article 222(1) of the Constitution a fresh oath is not necessary. But even if on a liberal interpretation of Article 219 such an oath may be necessary when a Judge is transferred from one High Court to another and before he enters in his new office as a transferee Judge, that, however, does not at all show that a Judge cannot be transferred without Ills consent.

112. Again, there are clear indications in the scheme of the Constitution itself to show that a distinction is sought to be made between appointment and transfer as pointed out above and even the need to take consent and when, was resent to the mind of the makers of the Constitution. For instance, Article 224A is a provision for appointment of retired Judges. The proviso expressly enjoins that a Judge shall sit and act as a Judge of the High Court with his consent. The proviso to Article 224A runs thus:

provided that nothing in this Article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that High Court unless he consents so to do.

The reason for insisting on consent is that a retired Judge cannot be (compelled to work as an ad hoc Judge against his consent because, after having retired from service, he ceases to be a Judge of the High Court and is not bound by the conditions of service. On the other hand, in Article 127 which provides for appointment of a sitting Judge of the High Court to act as an ad hoc Judge of the Supreme Court, there is an express provision in the shape of Clause (2) of Article 127 making it incumbent on the sitting Judges to attend the sittings of the Supreme Court. Here the consent of the sitting Judge of the High Court is not needed. Clause (2) of Article 127 runs thus:

It shall be the duty of the Judge who has been so designated, in priority to other duties of his office to attend the sittings of the Supreme Court at the time and for the period for which his attendance is required and while so attending he shall have all the jurisdiction powers and privileges and shall discharge the duties, of a Judge of the Supreme; Court.

113. Mr. Seervai sought to make a distinction on the ground that the word 'request' appearing in Article 127 clearly shows that the Judge must give his consent before he can be asked to work as an ad hoc Judge. In our opinion, such as interpretation is not possible. The word 'request' has been used as a matter of courtesy because the previous consent of the President of India is taken by the Chief Justice of India and then a request is made to the sitting Judge concerned. It is only in this context that the word 'request' has been used but the language of Clause (2) of Article 127 is clear that the sitting Judge, after a request is made to him, has no option in the matter but to act as an ad-hoc Judge of the Supreme Court. Indeed, if according to the sub-mission of Mr. Seervai the word 'request' appearing in Article 127(1) would include consent then Clause (2) would have become redundant. The words "it shall be the duty of the Judge who has been so designated" clearly imposes a statutory obligation on the Judge to accede to the request made by the Chief Justice under Article 127 of the Constitution. It would thus appear that the Constitution itself specifies 'consent' where it is intended and omits it when unnecessary. If, therefore, the Constitution makers intended that under Article 222 a Judge cannot be transferred from one High Court to another without his consent then it should have been expressly so mentioned in the Constitution. Against this background if we approach the problem by interpreting Article 222 the absence of the word "consent" in Article 222 or in any other provision (requiring consent of the Judge before his transfer) clearly shows that the transferee's consent is not within the purview of Article 222.

114. It was then argued that in the case of the subordinate judiciary the power of transfer is vested in the High Court whereas in the case of High Court Judges it is vested in the executive authority, namely, the President acting on the advice of the Council of Ministers and thus if Article 222 could be utilised without the consent of the Judges when the Judges of the High Courts would be worse off than the members of the subordinate judiciary. This argument, though attractive, fails to take into consideration certain important factOrs. In the first place, in the case of the subordinate judiciary transfer being one of the usual incidents of the service and being a usual feature which has to take place from time to time the power vests in the High Court. As already indicated, the power under Article 222 is to be exercised only exceptionally and in public interest; and where it becomes expedient and necessary in the public interest, especially of judicial administration, effective consultation with the Chief Justice of India, as a sine qua non, takes care of executive intrusions.

115. Lastly, it was submitted that during the last 25 years the Government had itself interpreted Article 222 as implying consent and a large number of Judges who were transferred during this period were transferred only with their consent. A schedule to the petition gives details of such Judges. Reliance was placed on the speech of Mr. Asoke Sen where he had said that a healthy convention should be set up not to transfer judges from one High Court to another without their consent. It was thus argued that those who were in charge of the working out of the Constitution had themselves interpreted Article 222 so as to imply consent of the Judge before transferring him from one High Court to another.

116. A table of judges transferred with their consent was furnished, hopefully to drive home the plea that the working of Article 222 for a silver jubilee span of years acknowledged that consent of the transferee was a necessary component. Two comments nullify this wishful thinking. A long-held, wholesome convention is a tribute to the wisdom of the President and his advisers and the Chief Justice, but cannot amend the sure import of the provision by hindsight. Secondly, closely analysed each such transfer has benefited immediately the Judge concerned. His consent, in such a situation, can never be a guide to control the clear intendment of the article reflected in its unambiguous terms. To re-write the Constitution, by the art of construction, passionately impelled by contemporary events, is unwittingly to distort the judicature scheme our founders planned with thoughtful care and to wish into words that plain English and plainer context cannot sustain. Ample as judicial powers are, they must be exercised with the sobering thought jus discreet non jus dare (to declare the law, not to make it). Moreover, Mr. Seervai himself agreed that when we interpret a constitutional provision, a mere convention based on several considerations cannot be taken as conclusive of the scope of the Article.

117. We are therefore clearly of the view that on an obvious interpretation of Article 222, the concept of consent cannot be imported therein. By healthy convention, normally the consent of the Judge concerned should be taken, not so much as a constitutional necessity but as a matter of courtesy in view of the high position that is held by him. But there may be cases where, if the Judge does not consent and the public interest compels, the power under Article 222 can be exercised.

118. If we may tersely sum up, the impact of other Articles, the embrace of the 'independence' creed, the influence of administrative precedents and the explosive allergy to the plurality of transfers which are not before the Court, cannot be permitted to subjective judicial construction to invite the comment 'Thy wish was father, .... to that thought'. Charity to the capacity of the illustrious dead whose learned toils and deliberate pens drafted Article 222 behaves us not to stultify them in their silent graves by slurring over the express language interpretatively to invent a hidden veto power.

119. The next point for consideration in this appeal is as to the nature, ambit and scope of consultation, as appearing in Article 222(1) of the Constitution, with the Chief Justice of India. The consultation, in order to fulfil its normative function in Article 222(1), must be a real, substantial and effective consultation based on full and proper materials placed before the Chief Justice by the Government. Before giving his opinion the Chief Justice of India would naturally take into consideration all relevant factors and may informally ascertain from the Judge concerned if he has any real personal difficulty or any humanitarian ground on which his transfer may not be directed.

Such grounds may be of a wide range including his health or extreme family factOrs. It is not necessary for the Chief Justice to issue formal notice to the Judge concerned but it is sufficient-although it is not obligatory-if he ascertains these facts either from the Chief Justice of the High Court or from his own colleagues or through any other means which the Chief Justice thinks safe, fair and reasonable. Where a proposal of transfer of a Judge is made the Government must forward every possible material to the Chief Justice so that he is in a position to give an effective opinion. Secondly, although the opinion of the Chief Justice of India may not be binding on the Government it is entitled to great weight and is normally to be accepted by the Government because the power under Article 222 cannot be exercised whimsically or arbitrarily. In the case of Chandramouleshwar Prasad v. Patna High Court and Ors. , while interpreting the word "consultation" as appearing in Article 233 of the Constitution this Court observed as follows:

Consultation with the High Court under Article 233 is not an empty formality. So far as promotion of officers to the cadre of District Judges is concerned the High Court is best fitted to adjudge the claims and merits of persons to be considered for promotion....We cannot accept this, Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views. If one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the prosper the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation.

120. In Samsher Singh's case , one of us has struck the same chord. It must also be borne in mind that if the Government departs from the opinion of the Chief Justice of India it has to justify its action by giving cogent and convincing reasons for the same and, if challenged, to prove to the satisfaction of the Court that a case was made out for not accepting the advice of the Chief Justice of India. It seems to us that the word 'consultation' has been used in Article 222 as a matter of constitutional courtesy in view of the fact that two very high dignitaries are concerned in the matter, namely, the President and the Chief Justice of India. Of course, the Chief Justice has no power of veto, as Dr. Ambedkar explained in the Constituent Assembly.

121. The dangers of arbitrary action or unsavoury exercise has been minimised by straight-jacketing of the power of transfer. Likewise, the high legal risk of invalidation of any Presidential order made in the teeth of the Chief Justice's objection, runs in an added institutional protection. For it is reasonable for the court before which a Judge's transfer is challenged, to take a skeptic view and treat it as suspect if the Chief Justice's advice has been ignored. And, in the light of the protective responsibility lying on the shoulders of the Chief Justice in filling the bill as a constitutional consultant and the chance of successful challenge, if the consultation proves a futility from either end, the judges of the High Court can enjoy all reasonable immunity. The monitoring mechanism will work well. And, where it does not, the Court, sitting in review of the action challenged (we hope these occasions will be rare and judicial demolition of presidential orders extremely few) will remember that the highest constitutional functionaries have an accountability to the justice constituency, i.e., the nation, that transfer is an exception but not totally banned and that a vicious or wayward judge cannot expect better justice or an independent judge of probity better immunity than is provided in the Constitution which binds him.

122. The speech of Shri A.K. Sen (Law Minister), the 14th Report of the Law Commission of India opposing and resolutions of the bar in 1967 favouring transfers of judges are neither here nor there. Nor can the heroic chapters of British judicial history directly assist to interpret. Each nation has its developmental course and derives inspiration from several sources. And the Court must decide on the basis of the Constitution as it is.

123. Logamachy may confuse, philosophy may illumine, teleology may shed interpretative sheen. We have considered the design, the source, the impact and the engineering aspects of Article 222. At the end of the journey we feel clearly that the power of non-consentaneous transfer does exist. Salutary safeguards to ensure judicial independence with concern for the All-India character of the superior courts in the context of the paramount need of national unity and integrity and mindful of the advantages of inter-state cross-fertilisation and avoidance of provincial perviciousness were all in the calculations of the furriers of the Constitution. A power is best felt by its aware presence and rare exercises.

124. We have earlier stated that the appeal has happily ended by consensus. The deeper constitutional issues have been considered and answered by us, responding to our duty under Article 141 and to avoid future shock to the cardinal idea of justice to the justices. Sri Seervai drew our attention to the course adopted by the Judicial Committee did in Don John Francis Douglas Liyanage v. The Queen 1967 I.A.C. 259. The highest court with constitutional authority to declare the law cannot shrink from its obligation because the its which has activised its jurisdiction has justly been adjusted. Moreover, full debate at the bar must be followed by fair judicative declaration. Now that the law is settled, ad hoc operations must be abandoned in favour of known finer normae. The 1st respondent has, fighting for a cause, won the battle and the war. The appellant, venerating the constitutional creed, has gained its object of getting the battle lines drawn clear and of delineation of the dharma concretising the zones of the President and the Chief Justice in the delicate function of transfer of High Court judges. Avoiding callous under-estimation and morbid exaggeration, we must realise that the independence of the judiciary is vital but is only an inset in, the larger picture of the nation's free, forward march.

N.L. Untwalia, J.

125. On or about the 27th May, 1976 about 16 Judges including some Chief Justices of the various High Courts were transferred by the President of India from one High Court to another. It is said that it was so done after consultation with the Chief Justice of India. One of the Judges transferred was Shri Justice Sankalchand Himatlal Sheth, a Judge of the High Court of Gujarat. He was transferred to the High Court of Andhra Pradesh. The notification transferring him reads as follows:

In exercise of the powers conferred by Clause (1) of Article 222 of the Constitution of India, the President after consultation with the Chief Justice of India, is pleased to transfer Shri Justice Sankalchand Himatlal Sheth Judge of the High Court of Gujarat, as Judge of the High Court of Andhra Pradesh with effect from the date he assumes charge of his office.

126. Shri Justice Sheth challenged the order of his transfer by a writ petition filed in the Gujarat High Court. In pursuance of the order, however, he joined the Andhra Pradesh High Court and did not ask for any stay. His writ petition was heard by a Special Bench of three Judges, who by a unanimous order, although for some varying reasons given in their separate judgments, declared the transfer order dated May 27, 1976 as illegal, invalid and ultra vires. They issued mandamus against the Union of India, the first respondent in the writ petition, to treat the said order as of no legal effect and to desist from giving effect or continuing to give effect to it. The Union of India filed the present appeal by certificate of the High Court granted under Articles 132 and 133(1) of the Constitution of India. The Judge concerned is Respondent No. 1 in this appeal. Shri Ajit Nath Ray, the then Chief Justice of India, who was also made a party respondent in the writ petition, is respondent No. 2 in the appeal.

127. Shri S.V. Gupte, Attorney General of India for the appellant and Shri Seervai, learned Counsel for Respondent No. 1 (hereinafter to be called the respondent) advanced very able, learned and exhaustive arguments but ultimately asked us to pass an order in the appeal in terms as agreed to between them. On the conclusion of the hearing of the appeal we recorded our order on the 26th of August, 1977, the agreed terms of which are as follows:

On the facts and circumstances on record the present Government do not consider that there was any justification for transferring Justice Sheth from Gujarat High Court and propose to transfer him back to that High Court.

On this statement being made by the learned Attorney General, Mr. Seervai, Counsel for Respondent No. 1 Justice S.H. Sheth) withdraws the writ petition with leave of the Court.

128. The appeal thus could be allowed to stand disposed of finally on the basis of the consent order alone but considering that the points involved in it were of great public importance we thought it necessary and expedient to pronounce our judgment on the same. We accordingly do so today.

129. The Judicial Committee of the Privy Council in the case of Ardeshir Mama v. Elora Sassoon 55 Indian Appeals, 360, had adopted a similar course almost under similar circumstances. Lord Olanesburgh, in delivering the judgment of their Lordships, observed as follows at page 366:

In his argument before the Board counsel for the respondent placed his view of the matter in the forefront of his argument and it was fully dealt with by Mr. Upjohn in his reply for the appellant. In these circumstances their Lord-ships think, that whether or not this appeal can be disposed of without further reference to it, they ought to express their views upon so important a question of practice now that it has been raised and fully argued. In such a matter certainty is more important than anything else. A rule of practice, even if it be statutory, can when found to be inconvenient be altered by competent authority. Uncertainty in such a matter is at best an embarrassment and may at its worst be a source of injustice which, in some cases, may be beyond judicial remedy. Accordingly, in this judgment, their Lordships will deal with all the matters in controversy to which they have referred, irrespective of the question whether the last of them of necessity now calls for determination at their hand.

130. Broadly speaking, only two' or three points require our careful consideration and adjudication. Several points were urged before the High Court but Mr. Seervai candidly stated before us that he did not want to pursue and press the question of promissory estoppel and the principle of violation of natural justice before making the order of transfer. He, however, submitted with great emphasis that the power of transfer under Article 222(1) of the Constitution could not be exercised or made effective without the consent of the Judge concerned. In the context of the high pedestal and the independence of the judiciary enshrined in our Constitution and some of the relevant articles the transfer envisaged was a consensual transfer and not a unilateral order of transfer forcing a Judge to go from one High Court to the other. Counsel further submitted that the consultation with the Chief Justice of India spoken of in the article aforesaid cannot be a mere formal or nominal consultation just by way of an empty formality. It must be real and effective after placing all materials before the Chief Justice of India in support of the proposed action of transfer by the President. There is no gain saying the fact that the power conferred on the President is not to be exercised by him in his discretion but it has got to be exercised on the advice of the Council of Ministers or the Ministers concerned. In other words, the order of transfer is, in substance and effect, an action of the Central Government.

131. My learned brother Chandrachud, J. has dealt with the point of consultation with the Chief Justice of India elaborately and in great details. Largely and generally I respectfully agree with his views expressed in this regard. I may, however, add, even though it may be a repetition, that no order of transfer can be made by the President without the consultation with the Chief Justice of India. Such a consultation is condition precedent to the making of the order. All necessary facts in support of the proposed action of transfer must be communicated to him and all his doubts and queries must be adequately answered by the Government. Ordinarily and generally the views of the Chief Justice of India ought to prevail and must be accepted. The Government, however, as rightly conceded by Mr. Seervai, is not bound to accept and act upon the advice of the Chief Justice. It may differ from him and for cogent reasons may take a contrary view. In other words, as held by this Court in the case of Chandramouleshwar Prasad v. Patna High Court and Ors. , the advice is not binding on the Government invariably and as a matter of compulsion in law. Although the decision of this Court in Chandramouleshwar Prasad's case was with reference to the interpretation of Articles 233 and 235 of the Constitution, on principle there is hardly any difference.

132. To invoke the principle of natural justice in the case of transfer of a Judge under Article 222(1) if otherwise it is permissible to make the transfer without his consent, will be stretching the principle, to a breaking point. It will lead to many unpractical, anomalous and absurd results and will have inevitable repercussions in the order of transfers made in other branches of service either under the Union or the States. The only thing one may say is that it will be open to the Chief Justice of India, rather, he will be well-advised to do so, to make such inquiries and from such quarters as he may think, fit and proper to do in order to satisfy himself apropos the desirability, advisability and the necessity of the proposed transfer. Inquiries from any of his colleagues in the Supreme Court and especially from the one coming from the High Court, a Judge of which is proposed to be transferred as also from the concerned Judge will be highly beneficial and useful.

133. In terms there is nothing indicated in Article 222(1) as to what could be the basis of and the grounds on which an order of transfer can be made. It was, however, accepted by all concerned that the transfer can be made only in public interest or on the ground of public policy which sometimes has been characterised by eminent jurists as an unruly horse. A definition of these terms in a strait jacket or an exhaustive list of matters of public interest is neither feasible nor advisable. In answer to my query the learned Attorney General was good enough to give a few examples, namely, (1) that a particular Judge is not pulling on well with the Chief Justice ana his colleagues in the High Court; (2) that any other High Court and especially a small one, needs the services of a Judge proficient in a particular branch of law; and (3) the general public policy of the Government of India declared from time to time has been that for the purpose of national integration an appreciable number of Judges in a particular High Court should be from other States, so on and so forth. There may also be a necessity of a transfer of a Judge on the ground that a Judge is not of good behavior such as not being above board in the matter of integrity and honesty, being either corrupt or showing favour to a section of the members of the Bar, or he is a casteist or parochial in his approach in the administration of justice or the judiciary in the State. It would be undoubtedly in the public interest to send him from one High Court to another. This may not completely put a stop to his misdeeds but may minimise them appreciably. Such a transfer, however, as also the transfer on the ground that he is not pulling on well with the Chief Justice or his colleagues in the High Court will be punitive in character. Apart from the other difficulties, which I shall be presently discussing, in the way of translating into action such a transfer in public interest, I may just indicate here, that in such a situation the action being punitive in character may not possibly avoid the application of the principles of natural justice. Setting up of an impartial Committee or Tribunal for deciding such cases of transfer may be necessary in order to maintain the independence of the judiciary. When an order of transfer, is challenged by the Judge concerned in an appropriate legal proceeding tremendous difficulties will have to be faced in the matter of judging as to what extent the materials can be disclosed in court, how far the Government will be able to claim privilege from disclosure, how will be judged the truth or otherwise of the allegations made. At this stage I am not focussing my attention on these matters for the purpose of deciding any of the questions posed so far but I am doing so with the object of expressing my considered view on the question as to whether a transfer can be made without the consent of the Judge concerned or not. The purpose of national integration, if otherwise it is a good thing to be achieved, or the need of particular High Court for a Judge possessing a particular type of proficiency or some such grounds of public interest can well be achieved at the time of the initial appointments; as for example, a member of the Bar practising in a particular High Court may be appointed at the very threshold, if he so agrees to be appointed, a Judge of another High Court so that after retirement he may come back and resume his practice in the High Court where he was so doing. I shall, perhaps, be crossing my permissible limits if I embark to write an essay or a thesis on the various aspects of the needs of such public interest high-lighting the minus points also in them, nor will it serve any useful purpose. These are matters of policy decision entirely within the realm of the governmental power.

134. I, however, cannot check myself from pointing out one more so-called example of public interest said to be in the alleged justification of the order of transfer. I need not elaborately refer to all the facts which are in the records of this case to justify the hints which I am going to throw hereafter. The provision for compensatory allowance made in Clause (2) of Article 222 was deleted

in 1956 but was re-introduced in the year 1963 when Shri A.K. Sen was the Law Minister of the Government of India. From his speech quoted in the judgment of the High Court as also from other facts given in the counter of the Union Government it is clear that although several transfers were made during the period of about 25 years since the advent of the Constitution, invariably as a matter of prudence, if not as a matter of rule, they were done with the consent of the Judge concerned. Mr. Sen in his speech also laid stress on this aspect of the matter. What led, all of a sudden, the then Central Government during the time of emergency in the year 1976 to suddenly transfer as many as 16 Judges from one High Court to the other. How did the necessity of public interest sprout so suddenly which led the Government to make this mass transfer? Allegations with reference to the particular examples were made in the writ petition of the respondent to show that by and large only those Judges were picked up for transfer who during the period of emergency had delivered judgments which were not to the liking of the then Government. These allegations were controverted in the counter of the Union Government. Truth or otherwise of the facts alleged were perhaps not justiciable in the case, or in any event, could not be adjudicated upon. But one thing is certain which I would venture to say and perhaps not unjustifiably or by crossing the permissible limits, that the order of transfer of so many Judges at one and the same time created a sense of fear and panic in the minds of the Judges and others throughout the country and led them to suspect strongly that the orders of transfers were made by and large in cases of Judges who had shown exemplary courage and independence even during the period of emergency in delivering judgments which were not the liking of the men in authority, including the judgments in many MISA cases. I am not concerned to say here whether the judgments delivered were right or wrong. No body can say that a Judge is liable to be transferred because he has delivered a wrong judgment. But one thing is certain and I again take courage to say so with the utmost responsibility that the panic created had shaken the very foundation and the structure of the independence of the judiciary throughout the country.

135. In a democratic set up of our country, as enshrined in the Constitution, the judiciary, in one sense is not a structure of a very big magnitude, but surely it is like a watching tower above all the big structures of the other limbs of State. From the top of its respective towers, the highest judiciary either by it in the State or in the center keeps a watch like a sentinel on the functions of the other limbs of the State as to whether they are working in accordance with the law and the Constitution, the Constitution being supreme. History of the world in some countries is not wanting in examples to illustrate and indicate that those wishing to deviate from democracy do not always like and relish the watching of their actions by the sentinels; calculated and designed attempts were made to erode the structure of the tower bit by bit. There have been and may be several methods to do so. One of them may be, if there is any truth in it, to transfer Judges who do not toe the line of the Government in power or fall in the current of their philosophy. How dangerous will it be to permit such a thing by granting of a bald and unbridled power to the Central Government to achieve such an object ? I may add that the safety valve of the effective consultation with the Chief Justice of India may not prove to be sufficiently effective to check up this tendency of the executive. There may be several methods of setting at naught the check of the safety valve. It needs no elaboration.

136. To some extent the remarks made by me above are illustrated by the terms of the consent order itself. Democratic franchise brought about a change in the Government and the present Government

categorically say that they "do not consider that there was any justification for transferring Justice Sheth from Gujarat High Court and propose to transfer him back to that High Court." One is merely left to conjecture what public interest led the previous Government to transfer Shri Justice Sheth; which the present Government found to be unjustified. Supposing there is a change of Government again then Justice Sheth may be transferred again. Are the Judges, thus, to be treated like a pack of tobacco to be transferred from one place to another at the sweet-will of the Government ?

137. In the background set out above 1 now come to the real grip of the matter as to whether a transfer can be made without the consent of the Judge concerned under Article 222(1) which reads thus:

222. Transfer of a judge from one High Court to another-(1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.

There are no words of limitation either express or implicit in the Article; nor do I think that Mr. Seervai is quite accurate and correct in pressing into service the canons of interpretation laid down in some of the cases viz., The River Wear Commissioners v. William Adamson [1876-77] 2 A.C. 743 and R.M.D. Chamarbaugwalla v. The Union of India [1957] S.C.R. 930. There are cases and cases, one line taking the view that no words may be added to or subtracted from the statute while interpreting it. If it has a plain and unambiguous meaning it must be adhered to. If there is any ambiguity it may be resolved on principles well-known and fully established. There is another line of cases taking the view that the Courts should try to understand the real intention of the Legislature and the true meaning of the words used. In such cases the history of the legislation, its purpose, context and the object to be achieved were pressed into service for interpreting it even though the words used in the statute were not ambiguous or uncertain. But I am of the view that this line of reasoning will not solve the difficulty of interpreting Article 222 in the manner suggested by Mr. Seervai. The key to the solution lies in the various Articles of the Constitution itself. It is of a different kind. That key has to be discovered and found out, of course, in the background of the various salient and the highest principles of maintaining the independence of the judiciary as far as it is permissible to do so within the terms of the Constitution. There is no All India cadre of High Court Judges in our country. Of and on there has been a talk or debate in this regard. Whether it will be advisable to do so or not is a very controversial matter and I refrain from ex-pressing any opinion of mine on this issue as it is neither advisable nor necessary to do so.

138. Section 200 of the Government of India Act, 1935 provided for the establishment and Constitution of a Federal Court consisting of a Chief Justice and certain number of other Judges. Under Sub-section (3) (a) a Judge of a High Court (leaving aside the details) was qualified for the appointment as a Judge of the Federal Court. Under Section 20G a High Court consisted "of a Chief Justice and such other Judges as the Governor General may from time to time deem it necessary to appoint". Under Sub-section (2) every Judge of a High Court was entitled to hold office until he attained the age of 60 years but it was subject to three provisos mentioned therein: (a) a Judge could resign his office; (b)He could be removed from his office on the ground of mis-behavior or of infirmity of mind or body etc; (c) the office of the Judge stood vacated "by his being appointed to be a Judge of the Federal Court or of another High Court". Neither in proviso (c) nor in any other

section of the Government of India Act was the word "transfer" used or such a power conferred in terms on the Governor General.

139. Now let me examine the relevant provisions of the Constitution of India. Article 124 provides for the establishment and Constitution of the Supreme Court as consisting of a Chief Justice of India and certain number of other Judges. A Judge of the Supreme Court is appointed under Clause (2) of Article 124. He holds office until he attains the age of 65 years subject to two provisos, viz., (a) resignation and (b) removal. A Judge of the High Court is qualified to be appointed as a Judge of the Supreme Court under Clause (3)(a). Under Clauses (4) and (5) a Judge of the Supreme Court may be removed on the ground of proved misbehavior or incapacity.

140. As I have said above, there is no All India cadre of High Court Judges. Article 214 says "there shall be a High Court of each State". According to Article 216 "Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint". Appointment and conditions of the office of a Judge of a High Court are provided for in Article 217 which clearly indicates that a qualified person is appointed as a Judge of particular High Court in a particular State at the threshold. He is entitled to hold office as a Judge of that High Court until he attains the age of 62 years. But this is subject to three exceptions mentioned in the proviso appended to Clause (1) of Article 217. Provisos (a) and (b) respectively deal with the resignation from the office of a Judge by his voluntary action and his removal from office in the manner provided in Clause (4) of Article 124 as in the cases of the removal of a Judge of the Supreme Court. Proviso (c) is important and is as follows:

the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

Article 222(1) confers power on the President to transfer. Before I make my comments it is necessary to read Article 219 which says:

Every person appointed to be a Judge of a High Court shall, before he enters upon his office, make and subscribe before the Governor of the State, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

Similarly, in the case of a Supreme Court Judge it has been provided in Clause (6) of Article 124:

Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

The important thing to notice is that if the office of a Judge is vacated by his resignation or removal, there is no question of his re-entering the office of a Judge either of the Supreme Court or the High Court; but if the office is vacated under proviso (c) of Article 217 then on appointment as a Judge of the Supreme Court he has to re-enter and occupy that office in accordance with Article 124(6). What

is the effect of the office of a Judge being vacated by his transfer to any other High Court? Does it stand vacated as soon as the order of transfer is made ? Or, is it vacated when he assumes office as a Judge of the High Court to which he is transferred? Proviso (c) provides for the vacation of the office of a Judge of the High Court from which he is transferred but Article 222 does not make any provision for re-entering office or occupying it as a Judge of the different High Court to which he is transferred. The only mode and the procedure left for that purpose is to be found in Article 219 and no where else. The mere order of transfer does not make him a Judge and a member of the High Court to which he is transferred. There is no such condition of service or office of a Judge provided for in the Constitution or in any other law. Appointment as a Judge to the Supreme Court and transfer to another High Court within the meaning of proviso (c), in my opinion, are in substance on the same footing. Appointment of a High Court Judge to be a Judge of the Supreme Court is not a mere act of transfer as it is an appointment to a higher Court. Yet for the continuity of the service, pension, travelling allowance etc. it has been treated as a transfer of the Judge from the High Court to the Supreme Court for being appointed to the latter Court. The word "transfer" has been used in proviso (c) of Article 217(1) and Article 222(1) because the transfer is from one High Court to another as a High Court Judge and not to any superior Court. But yet the effect of the transfer is to make the Judge transferred to vacate his office of a Judge of the High Court from which he is transferred and to appoint him as a Judge of the High Court of another State. For the purpose of continuity of service, pension, travelling allowance etc., there is hardly any difference between the case of appointment of a High Court Judge to the Supreme Court and transfer to another High Court.

141. I may lend further support to the view expressed above, as rightly pointed out by Mr. Seervai, from the two matters in the Schedules to the Constitution. Clause 11 (b) of Part D of the Second Schedule says:

Actual service" includes-

...

(ii) joining time on transfer from a High Court to the Supreme Court or from one High Court to another.

It is plain that the joining time on transfer in both the cases will keep the Judge transferred either to the Supreme Court or to the High Court, a Judge of the High Court from which he is transferred until he assumes charge of his office on appointment as a Judge of the Supreme Court or of another High Court. The form of oath or affirmation to be made by the Judge of High Courts as prescribed in the Third Schedule clearly indicates that under Article 219 the Judge takes the oath on his being appointed to be a Judge of a particular High Court and not of any High Court in India. To me it appears and I say at the cost of repetition, that a transferred Judge cannot become a Judge of the High Court to which he is transferred without taking his fresh oath in accordance with Article 219 and in the form prescribed in the Third Schedule. It was appointed out by the Attorney General that if it was so then the requirement of consultation with the Governor of a State and the Chief Justice of the High Court to which a Judge is transferred in accordance with Clause (1) of Article 217 was

also necessary but there is no such provision in Article 222. To me it appears that it may be a lacuna or this may not have been thought quite necessary. But that does not take away the effect of Article 219.

142. In State of Assam v. Ranga Mohammad and Ors. . Hidayatullah, J., as he then was, delivering the judgment on behalf of a Constitution Bench, with reference to the interpretation of Articles 233 and 235 pointed out at page 460.

In the same way the word 'posting' cannot be understood in the sense of 'transfer' when the idea of appointment and promotion is involved in the combination. In fact this meaning is quite out of place because 'transfer' operates at a stage beyond appointment and promotion.

The above passage would lend support the view that transfer operates at a stage beyond appointment. But then, a vital distinction has to be noticed between the language of the various Articles in Chapter V of Part VI mentioned above and Article 233 occurring in Chapter VI of that PArticle The said Article in terms uses the words:

Appointments of persons to be and the posting and promotion of, district Judges in any State...

The appointment, therefore, is to the post of a District Judge in a particular State and not for holding the office of a District Judge in a particular District. Similarly, there are other All India Services, such as in the Income Tax Department, in the Income Tax Appellate Tribunal, in the Customs Department etc. where the appointments are to the All India cadre in a particular service. In such a service orders of transfers are made transferring a particular officer from one place to another. In terms it does not require vacating his office of the post in a particular place and assumption of it in another place in any prescribed form or special manner. The mere order of transfer brings about both the results. In the case of High Courts, however, they being the courts of record and the highest courts in the federal structure of. our Constitution in their respective States, the founding-fathers adopted a different scheme. Although they made a departure in providing for transfer of a Judge from one High Court to another in Article 222 from the provisions of the Government of India Act, in substance, they did not do so, as they did not prescribe any mode for the transferred Judge acquiring his office of a Judge of the High Court to which he is transferred. The provision apparently conferring this bald power on the President seems to have been made just for the purpose of keeping it so on the Statute Book and not for the purpose of utilizing it in the manner it was done in the year 1976. In my considered judgment it could not be so utilised. It may well be that public interest in some cases does require and necessitate the transfer of a Judge from one High Court to another but it is strange to think that a Judge could be compelled to vacate his office of the Judge of a High Court to which he was initially appointed and assume office as a Judge of another High Court without his consent. If this view was possible to be taken in the case of transfer, it was all the more reasonable to do so in the case of appointment of a High Court Judge to be a Judge of the Supreme Court. Articles dealing with appointments of Judges either to the High Court or to the Supreme Court do not, in terms, require the consent of the appointee, yet no body has suggested so far nor could any body do so with any semblance of justification that a Judge of the High - Court can be appointed a Judge of the Supreme Court without his consent. Public interest

may require that he should be so appointed. But at the same time public interest also demands non-interference with the independence of the judiciary by not forcing a Judge to vacate his office of a Judge of the High Court to which he was appointed and to accept the office of a Judge of the Supreme Court or the High Court without his consent, until and unless a special law or procedure has been made or prescribed guarding against any inroad on the independence of the judiciary.

143. I am tempted to adopt the reasoning of Lord Reid and Lord Pearce given in the quotations of their speeches in the case of Rondel v. Worsity [1969] 1 A.C., 191,- Quoting Lord Justice Fry at page 229 Lord Reid has said:

The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but because if their conduct was actionable, actions would be brought against judges and witnesses in cases in which they had not spoken with malice, in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty. It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions.

Lord Pearce has quoted at page 269 a passage from the speech of Lord Earl of Halsbury, L.C., which runs as follows:

It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice- namely, the preliminary examination of witnesses to find out what they can prove. It may be that to some extent it seems to impose a hardship, put after all the hardship is not to be compared with that which would arise if it were impossible to administer justice, because people would be afraid to give their testimony.

I am not concerned to examine in the case whether the law in India in this regard is exactly the same or not but I felt tempted to quote those passages to show that there may be necessity and justification on the ground of public interest or policy for the transfer of Judges from one High Court to another, although it may be few and far between or even punitive in character, but to do so without the consent of the Judge concerned will bring about devastating results and cause damage to the tower of judiciary and erosion in its independence. If adequate safeguards are provided for to examine individual cases on merits by an impartial and independent body, the matter may be different.

144. Learned Attorney General argued that to impose the condition of consent in the power of transfer engrafted in Article 222 is a denial of the power itself. I do not accept this submission to be quite correct. It is tantamount to merely circumscribing the power in a narrow limit and putting restrictions upon it. If the scheme of the relevant articles of the Constitution alluded to by me above

warrant such a view, as it does, in the interest of the independence of the Judiciary, 1 for one. would cast my vote in its favour as my judicial conscience does not permit me to allow the executive to temper with the independence of the judiciary in this fashion. I would try to prevent it if it is possible to do so on justifiable, valid and reasonable grounds.

145. I would end my judgment by quoting a memorable passage from the judgment of Lord Pearce in the case of Don John Francis Douglas Liyanage and Ors. v. The Qeen (1) at page 291:

If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges. It is appreciated that the legislature had no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances.' And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution. In their Lordships' view the Acts were ultra vires and invalid.

I am conscious of the fact that I am not dealing with the vires, nor could I do so, of the provisions of the Constitution contained in Article 222. But I have extracted the above passage with the purpose of laying stress on the words "what is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances". If the Constitution allows it, let it be done. We cannot prevent it. But if such a situation is possible to be restrained by the rules of construction and interpretation of the various articles of the Constitution, we shall be failing in our duty if we do not do so in the larger interest of our country and the preservation of the democracy.