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GAUHATI HIGH COURT AND ANR.

v.

KULADHAR PHUKAN AND ANR.

MARCH 22, 2002

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[R.C. LAHOTI AND K.G. BALAKRISHNAN, JJ.]

Constitution of India, 1950, Article 235:

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Control over subordinate courts—Control of High Court and consultation with High Court—Scope and extent of—Word ‘Control’ used in comprehensive sense and ‘consultation’ means meaningful, effective and conscious consultation—Such control and consultation are not mere formalities.

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‘Consultation’ with High Court—Requirement of—Sending copy of notification to High Court by the State Government after appointment—Whether satisfies requirement of ‘consultation’—Held, no—Further invalidity caused by non-compliance with the mandatory constitutional requirement, cannot be cured by sheer inaction on the part of one or both the functionaries.

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Lien in service—Judicial officer appointed temporarily in State Government—Later regularised—No consultation with High Court—Whether lien of judicial officer in judicial services automatically stood terminated on his appointment in legal services—Held, in such a case lien in judicial service does not get terminated.

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Assam Public Service (Ad-hoc) Appointment Rules, 1986/Assam Legal Service Rules, 1962—Rules 3(1)/Rule 7—Ad-hoc appointment—Judicial Officer in state service—Previous Consultation with High Court—Requirement of—Whether mandatory—Held, yes.

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Respondent No.1 was appointed as a judicial officer in Assam Judicial Service Grade-III. After few years an advertisement was issued inviting applications for appointment for a post of Deputy Secretary in Grade III of Assam Legal Service. Appointment was temporary and terminable without notice on the post being filled up through the Assam Public Service Commission (APSC) by way of regular recruitment. Respondent No.1 filed application which was forwarded by the High Court of Assam and was temporarily appointed. High Court spared his service for taking over new

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appointment. Then the notification of appointment was issued. A

Later on respondent No.1 was confirmed. Thereafter applications were invited for regular appointment on the post of Deputy Secretary. Respondent No.1 also filed application but not through High Court. He was then selected and was "regularized" as Deputy Secretary, Assam Legislative Department. Notification was issued to this effect. Before or after regularization of the appointment of respondent No.1, there was no consultation by the Government with the High Court. B

Respondent No. 1 was promoted by High Court from Grade III to Grade II of the Assam Judicial Service though he was allowed to continue in the "present post" until further orders. Thereafter respondent No.1 was informed that he could exercise his option either to continue in the Assam Legal Service or to revert to Assam Judicial Service. Respondent No.1 neither expressed his option nor gave any response. C

Government of Assam then promoted respondent No.1 "temporarily and until further orders" from the post of Deputy Secretary to Grade II of the Assam Legal Service and notification was issued. Again there was no consultation by the Government with the High Court before or even after directing such promotion. D

High Court decided to recall respondent No.1 to his parent department and to post him as Assistant District and Sessions Judge. However, respondent No.1 desired for permanent absorption in the Assam Legal Service. He then filed writ petition. Single Judge of High Court dismissed the writ petition holding that respondent No.1 was a member of Assam Judicial Service and could not have been regularized or absorbed in Assam Legal Service without consulting the High Court. Respondent No.1 then filed a writ appeal. Division Bench allowed the same holding that the appointment of respondent No.1 in Assam Legal Service was on substantive post and he could not have held lien against two substantive posts. Hence the present appeal. E F

Disposing of the appeal, the Court G

HELD: 1. Article 235 of the Constitution vests in the High Court, the control over district courts and courts subordinate thereto. All the matters touching the service career of incumbents in subordinate judiciary including their posting and promotion are subject to the control of the High Court. Once a person has entered the judicial service, he cannot depart therefrom save H

A by the leave of the High Court. The word 'control' referred to in Article 235 of the Constitution has been used in a comprehensive sense and includes the control and superintendence of the High Court over the subordinate courts and the persons manning them, both on the judicial and the administrative side. Even in such matter in which the Governor may take a decision, the decision cannot be taken save by consultation with the High Court. The consultation the mandatory and the opinion of the High Court in binding on the State Government; else the control, as contemplated by Article 235, would be rendered negated. Such control and consultation are not a matter of mere formality; they are the constitutional power and privilege of the High Court, also its obligation, and cannot be diluted by sheer inaction of failing to act when the High Court must act. The Governor cannot proceed to act in any matter relating to subordinate judiciary and bypass the process of consultation merely because the High Court, though 'informed', did not act or respond. The consultation here means meaningful, effective and conscious consultation. [818-B-E].

D *Tej Pal Singh v. State of U.P. and Anr.*, [1986] 3 SCC 604, relied on.

State of Orissa v. Sudhansu Sekhar Misra and Ors., [1968] 2 SCR 154; *State of Bihar and Anr. v. Bal Mukund Shah and Ors.*, [2000] 4 SCC 640; *Madan Mohan Choudhary v. State of Bihar and Ors.*, [1999] 3 SCC 396; *Chief Justice of Andhra Pradesh and Anr. etc. v. L.V.A. Dikshitulu and Ors., etc.*, [1979] 2 SCC 34 and *The State of West Bengal and Anr. v. Nripendra Nath Bagchi*, [1966] 1 SCR 771, referred to.

F 2.1. An ad-hoc appointment required to be made 'immediately' in the public interest may be made dispensing with reference to the Public Service Commission. However, if a candidate already in judicial service is to be appointed, obviously his services shall have to be spared by the High Court failing which he cannot be appointed even ad-hoc. A post which has been sanctioned for, or is likely to last for more than four months, has to be filled up by making appointment on regular basis in consultation with the Public Service Commission. If the person chosen for such appointment is a judicial officer, he cannot be appointed without consulting the High Court, such consultation being mandatorily required by Rule 7. The provision for consultation in the rule brings it in conformity with the Constitution. [821-B-D]

H 2.2. Respondent No. 1 was appointed as Deputy Secretary in Assam

Legal Service Grade-III on temporary and ad-hoc basis to satisfy the immediate need of the State Government. For that purpose the application by respondent No. 1 was forwarded by the High Court and his services were also spared for taking over the new assignment. However, while seeking an appointment on regular basis as Deputy Secretary, Respondent No. 1 and the State Government gave a complete go-by to the constitutional requirement of consultation. Similarly while promoting respondent No. 1 from Grade-III to Grade II of Assam Legal Service and appointing him as Joint Secretary and Legal Remembrancer, the High Court was not consulted. Merely because the State Government sent a copy of its notifications to the High Court, the requirement of consultation cannot be said to have been satisfied. An invalidity caused by failure to comply with mandatory constitutional requirement. Such as of consultation, cannot be cured by sheer inaction on the part of one or both of the functionaries between whom the requirement was to be fulfilled or by mere lapse of time. [821-D, E, F, G, H]

2.3. There is no merit in the plea that the service of respondent No.1 stood absorbed in the Assam Legal Services and the High Court could not have recalled the first respondents deputation and that the lien of respondent No. 1 in the State Judicial Services has come to an end and he had acquired a lien in Assam Legal Service. The Division Bench of the High Court was unnecessarily influenced by the factum of the High Court having recalled its notification posting respondent No.1 as judicial officer ignoring the reason behind recalling the notification. This notification had to be recalled as it was not carried out and required to be recalled so as to issue another notification filling up judicial office lying vacant. So also the Division Bench ignored the impact of constitutional provision while forming an opinion that the lien of respondent No.1 in judicial service stood automatically terminated as the appointment of respondent No.1 to legal service, whilst he was a member of judicial service, was made without consultation with the High Court and hence was invalid. The question of respondent No.1 acquiring of a lien in legal service and the lien the judicial service being terminated did not arise. Therefore, the judgment of the Division Bench cannot be sustained and is liable to be set aside. [822-E-H; 823-A]

2.4. The State Government shall take a decision as to whether Respondent No.1 could be posted in an officer other than that of Secretary (Judicial) and Legal Remembrancer in which case he may continue in Assam Legal Service and need not be repatriated; in case such a decision is not taken within 6 weeks then respondent No.1 should be repatriated to the High Court

A as a member of judicial service. [824-C-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2337 of 2002.

B From the Judgment and Order dated 2.6.2000 of the Gauhati High Court in W.A. No. 177 of 1996.

Vijay Hansaria, Sunil Kumar Jain for M/S. Jain Hansaria and for the Appellant.

P.K. Goswami, R. Rahim and Rajiv Mehta for the Respondents No. 2

C Ms. Asha G. Nair, V.K. Sidatharan and Ms. Krishna Sarma for M/s. Corporate Law Group for State of Assam

The Judgment of the Court was delivered by

D R.C. LAHOTI, J. Leave granted.

E On 2.7.1977, Kuladhar Phukan, the respondent No.1, was appointed as a judicial officer in Assam Judicial Services Grade-III and on 5.7.1977, he was posted as Judicial Magistrate Second Class at Tinsukia. On 27.2.1986, the Government of Assam, Judicial Department : Judicial Branch made an advertisement inviting applications for appointment for a post of Deputy Secretary in Grade III of Assam Legal Service. Such appointment was to be made under Regulation 3(e) of APSC (Limitation of Function) Regulations, 1951 to meet the immediate need. The appointment was temporary and terminable without notice on the post being filled up through the Assam Public Service Commission (APSC) by way of regular recruitment. The field of recruitment was advocates or pleaders with five years practice or judicial officers with five years standing. The respondent No.1 made an application which was forwarded by the High Court of Assam. He was selected and appointed "temporarily and until further orders" in Grade III of the Assam Legal Service. Copies of notification of appointment dated 18.7.1986 were sent to the Registrar, Gauhati High Court, Gauhati with a request to release the officer immediately so as to enable him to join the new assignment; to the respondent No.1 informing him that as soon as the post was advertised by the APSC, he should apply to the APSC for regularization of his ad-hoc appointment; and to the Secretary, APSC stating that the appointment became necessary in the interest of public service and the Commission was requested

G to advertise the post immediately and send its recommendation to the

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Government as early as possible.

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On 29.7.1986, the High Court directed the respondent No.1 to hand over charge of his office to another judicial officer and proceed to join his new assignment immediately. The Government was informed that the services of the respondent No.1 were being placed at the disposal of the Government of Assam consistently with the appointment made. On 11.9.1986, the respondent No.1 was confirmed in Assam Judicial Service Grade III. His relative seniority was determined in Grade II of Assam Judicial Service and he was placed on probation in Grade II.

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Thus, all went well. The seeds of controversy were sown when the Government of Assam, Judicial Department : Judicial Branch invited applications for regular appointment on the post of Deputy Secretary, in response to which, the respondent No.1 also made an application. He was selected by Assam Public Service Commission and pursuant to the recommendation made by the Commission, the Government of Assam "regularized" the appointment of respondent No.1 as Deputy Secretary to the Government of Assam, Legislative Department. A notification to this effect was issued on 10.9.1987 copy whereof was sent to the Registrar (Judicial), Gauhati High Court, Gauhati. We may hasten to add here itself that it is not disputed that for seeking regular appointment the respondent No.1 did not have his application forwarded by the High Court to the Commission or the Government. Before or after regularization of the appointment of respondent No.1, there was no consultation by the Government with the High Court. We will revert back to details of this aspect of the matter a little later.

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On 11.9.1986 the High Court notified seniority list of judicial officers in Assam Judicial Service Grade III. The respondent no.1 had some grievance about the place to which he was assigned in the seniority list. On 24.6.1988 he made a representation to the High Court wherein he stated, inter alia, "basically I was and still am a judicial officer in the Grade III of the Assam Judicial Service", "I was appointed regularly and permanently" in judicial service, and that failure "to confirm our service and fix our inter se seniority" in the service violated principles of natural justice and Articles 14, 16 and 311 of the Constitution. He prayed for re-consideration and re-fixation of his confirmation and seniority in the judicial service. On 7.4.1992, the respondent no.1 was amongst six judicial officers who were promoted by the High Court from Grade III to Grade II of the Assam Judicial Service though he and one other were allowed to continue in their "present post" until further orders. On 9.4.1992 the respondent no.1 was informed that in view of such promotion

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A and having been allowed to continue in his “present assignment for the time-being” then held by him he could exercise his option either to continue in the Assam Legal Service or to revert to his parent service, i.e., Assam Judicial Service. The respondent no.1 neither expressed his option nor gave any response to the High Court.

B On 19.8.1992 the Government of Assam promoted the respondent no.1 “temporarily and until further orders” from the post of Deputy Secretary to Grade II of the Assam Legal Service and posted him as Joint Legal Remembrancer to the Government of Assam, Judicial Department, with effect from the date of his taking over charge. Copy of the notification was sent to the Registrar, Gauhati High Court. Here again there was no consultation by
C the Government with the High Court before (or even after) directing such promotion.

The controversy erupted when on 23.2.1995 the High Court informed the Government of Assam, and the respondent no.1, of its decision to recall the respondent no.1 to his parent department and that a suitable substitute in
D place of respondent no.1 will be provided in due course. On 4.4.1995, the Registrar (Judicial) once again requested the State Government to take immediate steps to replace the services of respondent no.1 at the disposal of the High Court so that the officer could be repatriated and be posted as Assistant District and Sessions Judge, North Lakhimpur on or before 24.4.1995.

E On 10.4.1995 the High Court notified the posting of respondent no.1 as Assistant District and Sessions Judge, Lakhimpur. On 26.4.1995 the respondent no.1 sent a communication to the Registrar (Judicial), Gauhati High Court wherein, for the first time, he stated that he was a direct recruit in the Assam Legal Service through the Assam Public Service Commission and that he had expressed his desire indicating his option for permanent absorption in the
F Assam Legal Service. It was further stated that it was expected that his service in the Assam Legal Service would be confirmed as Hon’ble Minister (Law etc.) had ordered for such confirmation. He requested for his posting as Judicial Officer at North Lakhimpur being cancelled. On 20.3.1996 the Government of Assam notified the services of respondent no.1 being placed

G at the disposal of the Gauhati High Court. By yet another notification of the same date the Government of Assam released the respondent no.1 from the post of Joint Legal Remembrancer and Joint Secretary so that he could join as Assistant District and Sessions Judge, Lakhimpur pursuant to the notification of the High Court.

H It appears that from the date of the abovesaid two notifications dated

20.3.1996 the respondent no.1 was on leave. On 26.3.1996 the respondent no.1 filed a writ petition in the High Court laying challenge to the notification dated 10.4.1995 issued by the High Court and the two notifications dated 20.3.1996 issued by the State Government. A learned Single Judge of the High Court admitted the writ petition for hearing and stayed the impugned notifications. On 6.5.1996 the learned Single Judge dismissed the writ petition filed by respondent no.1 holding that the respondent no.1 was a member of Assam Judicial Service and could not have been regularized or absorbed in Assam Legal Service without consultation with the High Court. On 17.5.1996 the respondent no.1 preferred a writ appeal. A Division Bench of the High Court stayed the judgment of the learned Single Judge. On 17.9.1996 the High Court recalled its notification dated 10.4.1995 as the respondent no.1 had not assumed charge of the post and the same was lying vacant. On 2.6.1998 the Government of Assam also cancelled its two notifications dated 20.3.1996. On 2.6.2000 the Division Bench of the High Court allowed the writ appeal of respondent no.1 and quashed the notifications dated 10.4.1995 and 20.3.1996 forming an opinion that the appointment of respondent no.1 in Assam Legal Services was a substantive appointment. He could not have held lien against two substantive posts. The Division Bench went on to state, "we are, therefore, unequivocally of the view that the appellant has acquired a substantive post in the Assam Legal Service subsequently since from 18.7.1986 and his lien in the judicial service automatically stands terminated by operation of law with effect from 18.7.1986".

Feeling aggrieved by the judgment of the Division Bench of the High Court, the Gauhati High Court and its Registrar have filed this appeal by special leave.

It appears that the respondent no.1 does not wish to be repatriated to the judicial service and wishes to continue in Assam Legal Service. During the course of hearing before this Court we had asked the learned counsel for the High Court to have instructions if the High Court is agreeable not to pursue the matter and leave the respondent no.1 where he is. We were informed that the High Court was not so very serious about the respondent no.1 being brought back to the judicial services the right place to which he belongs and ought to be, but the High Court was certainly concerned about its stand being vindicated for preserving the independence of judiciary and the sanctity of Article 235 of the Constitution being maintained. It was also submitted by the learned counsel for the High Court that the impugned judgment of the Division Bench if sustained would create serious and anomalous situations

A where the judicial officers sent on deputation to various Government departments or whose services are temporarily loaned and placed at the disposal of employers other than the High Court in the interest of public convenience and better public administration may in future claim having been absorbed at such other places without the consent of the High Court and without the High Court having been consulted which would create a chaotic situation. We appreciate the concern of the High Court and a fair stand taken by it, and therefore, proceed to decide the matter on merits.

C Before we may embark upon the principal issue for determination it would be appropriate to place on record the stand taken by the Government of Assam. In the writ petition filed by the respondent no.1, the High Court filed a counter-affidavit disputing correctness of the stand taken by the respondent no.1 but the State Government did not choose to file any counter-affidavit. Instead written arguments were filed wherein very clearly and categorically the stand taken by the State Government is that the appointment of respondent no.1 in Assam Legal Services on the post of Deputy Secretary as also on the post of Joint Legal Remembrancer and Joint Secretary, Judicial Department was temporary and until further orders i.e. a purely temporary arrangement. It was "absolutely untrue" that the respondent no.1 was confirmed as a regular member of the Assam Legal Service. The conduct of the respondent no.1 was commented upon by alleging that the respondent no.1 was managing to get the best of both the worlds. Placing reliance on the decision of this Court in *State of Orissa v. Sudhansu Sekhar Misra and Ors.*, [1968] 2 SCR 154, the State Government contended that the respondent no.1 was a member of Assam Judicial Service and his services were handed over outside the cadre 'temporarily and until further orders' and therefore it was open for the High Court to recall the respondent no.1 and post him as Presiding Officer of a District Court. The State Government endorsed the act of the High Court as "unassailable" as the lien of respondent no.1 in his substantive post in his parent service, viz., Assam Judicial Service "still continues". On point of fact, the State Government agreed, that the respondent no.1 had not applied to the APSC with the permission of and under intimation to the High Court while seeking regular appointment.

H It is strange to notice a complete somersault taken by the State of Assam before this Court by having abandoned the stand taken in the High Court and taking a stand completely at variance. In its reply affidavit dated 3.11.2001 the State of Assam has stated that the respondent no.1 was a direct recruit to the Assam Legal Service, on a regular basis and with the consent

of the Gauhati High Court. On 28.8.1998 on his confirmation in Assam Legal Service Grade II, his lien in Assam Judicial Service stood automatically terminated by operation of law. Strangely enough the Government of Assam now proceeds to deny that the consultation with the High Court for the appointment of respondent no.1 in the Assam Legal Service was necessary. Here itself we may state that during the course of hearing we had asked the learned counsel for the parties that if consultation with the High Court was necessary, and if so, then how and in what manner the requirement of consultation was satisfied? Both the learned counsel very fairly stated that the requirement of consultation could not be dispensed with. However, the requirement was satisfied, submitted the learned counsel for respondents No.1 and No.2, inasmuch as every step taken by the respondent no.1 or by respondent no.2 was brought to the notice of the High Court and the High Court although having knowledge of all the developments in the service career of the respondent no.1 whilst in Assam Legal Service and yet never objected or reacted to the continuance of the respondent no.1 in Assam Legal Service and also on his being promoted from Grade III to Grade II in Assam Legal Service never objected, much less protested, to what was being done. The inference which necessarily follows is that the High Court was agreeable to such continuance and promotion which satisfies the requirement of consultation. We will examine the validity of this contention a little later.

Article 235 of the Constitution provides:

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

The doctrine of separation of powers and the need for having an independent judiciary as a bulwark of constitutional democracy persuaded the founding fathers of Constitution assigning a place of distinction to judiciary. Chapter VI of the Constitution dealing with subordinate courts seeks to achieve the avowed object of insulating even the subordinate judiciary from the influence of the executive and the legislature. Article 234 provides for

A appointments of persons other than District Judges to the judicial services of a State being made by the Governor of the State in accordance with the rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State. Article 235 vests in the High Court the control over district courts and courts subordinate thereto. All the matters touching the service career of incumbents in subordinate judiciary including their posting and promotion are subject to the control of the High Court. Once a person has entered in the judicial service, he cannot depart therefrom save by the leave of the High Court. It is settled by a catena of decisions that the word 'control' referred to in Article 235 of the Constitution has been used in a comprehensive sense and includes the control and superintendence of the High Court over the subordinate courts and the persons manning them, both on the judicial and the administrative side. Even in such matter in which the Governor may take a decision, the decision cannot be taken save by consultation with the High Court. The consultation is mandatory and the opinion of the High Court is binding on the State Government; else the control, as contemplated by Article 235, would be rendered negated. Such control and consultation are not a matter of mere formality; they are the constitutional power and privilege of the High Court, also its obligation, and cannot be diluted by sheer inaction or failing to act when the High Court must act. The Governor cannot proceed to act in any matter relating to subordinate judiciary and bypass the process of consultation merely because the High Court, though 'informed', did not act or respond. The consultation here means meaningful, effective and conscious consultation. In *Tej Pal Singh v. State of U.P. and Anr.*, [1986] 3 SCC 604, it was held that in a matter affecting the service career of a judicial officer ordinarily the initiative for an action must come from the High Court and even otherwise in the absence of recommendation of the High Court an action taken by the Governor would be illegal and devoid of constitutional validity. Such error, if committed, would be incurable and even an ex-post facto approval would not cure the invalidity.

In The *State of Orissa v. Sudhansu Sekhar Misra and Ors.*, (supra), it was held that the High Court is made by the Constitution the sole custodian of the control of the judiciary. It will be useful to extract and reproduce the following passage from the judgment of the Constitution Bench (at pp. 163-164):-

H "While sparing the service of any judicial officer to the government it is open to the High Court to fix the period during which he may hold any executive post. At the end of that period, the government is

bound to allow him to go back to his parent department unless the High Court agrees to spare his services for some more time. In other words, the period during which a judicial officer should serve in an executive post must be settled by agreement between the High Court and the government. If there is no such agreement it is open to the government to send him back to his parent department at any time it pleases. It is equally open to the High Court to recall him whenever it thinks fit. If only there is mutual understanding and appreciation of the difficulties of the one by the other, there will be harmony. There is no reason why there should be any conflict between the High Court and the government. Except for very good reasons we think the High Court should always be willing to spare for an agreed period the services of any of the officers under its control for filling up such executive posts as may require the services of judicial officers. The government, in its turn, should appreciate the anxiety of the High Court that judicial officers should not be allowed to acquire vested interest in the secretariat. Both the High Court and the government should not forget the fact that powers are conferred on them for the good of the public and they should act in such a way as to advance public interest. If they act with that purpose in view as they should, then there is no room for conflict and no question of one dominating the other arises. Each of the organs of the State has a special role of its own. But our Constitution expects all of them to work in harmony in a spirit of service.”

In *State of Bihar and Anr. v. Bal Mukund Sah and Ors.*, [2000] 4 SCC 640, the Constitution Bench has again brought to fore and thrown light on the complete and insulated scheme for subordinate judiciary services handed down by the founders of the Constitution which cannot be tinkered with by anyone. Any rules framed affecting the service structure of judicial services must be preceded by consultation with the High Court else it results in truncating the powers of High Court playing a vital role in preserving the independence of judiciary. Even rules framed by the Governor under Article 234 read with Article 309 proviso must satisfy the requirement of consultation with the High Court which cannot be given a go-by. In *Madan Mohan Choudhary v. State of Bihar and Ors.*, [1999] 3 SCC 396, this Court has held that the three words, namely, ‘posting’, ‘promotion’ and ‘grant of leave’ used in Article 235 of the Constitution are only illustrative in character and do not limit the extent of control exercised by the High Court over the officers of the subordinate judiciary. In *Chief Justice of Andhra Pradesh and Anr. etc.*

A v. *L.V.A. Dikshitulu and Ors. etc.*, [1979] 2 SCC 34, the Constitution Bench clarified the meaning of the expression 'control' over District Courts and Courts subordinate thereto 'vesting' in the High Court and clearly stated that, amongst others, transfers and promotions and confirmation of such promotions of persons holding posts in the judicial service, transfers of District Judges and recall of District Judges posted on ex-cadre posts or on deputation on administrative posts vests in the High Court. Constitution Bench decision in *The State of West Bengal and Anr. v. Nripendra Nath Bagchi*, [1966] 1 SCR 771 and in *State of Orissa v. Sudhansu Sekhar Misra and Ors.*, (supra), also took the same view.

C Rule 3(1) of Assam Public Service (Ad-hoc) Appointment Rules, 1986, and Rule 7 of Assam Legal Service Rules, 1962, which are relevant for our purpose, provide as under:-

Rule 3(1) abovesaid :

D "Ad hoc appointment- (1)Notwithstanding anything contained in any Service Rules, ad hoc appointment by direct recruitment to a temporary post created under the government may be made, if it is necessary in the public interest that the appointment should be made immediately and reference to the commission would cause undue delay:

E Provided that if the post has been sanctioned for or is likely to last for more than four months, the commission shall, as soon as possible, be consulted for making the appointment on regular basis, as provided for in clause (c) of sub-rule (2) of this rule.

Rule 7 abovesaid :

F 7. Selection of Candidates -

G (1) In the case of selecting persons for appointment to the service directly, the Governor shall make selection from qualified legal practitioners or judicial officers taking into consideration the person's legal qualifications, tact, general intelligence, integrity and previous experience, if any:

Provided that in the case of appointment of a person to the service from amongst the Judicial Officers, no such appointment shall be made without consulting the Assam High Court.*

H (2) It shall not be necessary for the Governor to consult the Public

Service Commission for filling up the posts in Grade-I and Grade-II of the Service, but appointments to Grade-III and Grade-IV of the Service shall always be in consultation with the Public Service Commission.”

*(now Gauhati High Court).

An ad-hoc appointment required to be made ‘immediately’ in the public interest may be made dispensing with reference to the Public Service Commission. However, if a candidate already in judicial service is to be appointed, obviously his services shall have to be spared by the High Court failing which he cannot be appointed even ad-hoc. A post which has been sanctioned for, or is likely to last for, more than four months, has to be filled up by making appointment on regular basis in consultation with the Public Service Commission. If the person chosen for such appointment is a judicial officer, he cannot be appointed without consulting the High Court, such consultation being mandatorily required by Rule 7. The provision for consultation in the rule brings it in conformity with the Constitution.

The appointment of respondent No.1 as Deputy Secretary in Assam Legal Service Grade-III was made initially on temporary and ad-hoc basis to satisfy the immediate need of the State Government. For that purpose the application by respondent No.1 seeking such appointment was forwarded by the High Court and his services were also spared for taking over the new assignment. However, thereafter the respondent No.1 and the State Government gave a complete go-by to the constitutional requirement of consultation. While seeking an appointment on regular basis as Deputy Secretary, neither the respondent No.1 felt the need of having his application forwarded by the High Court nor did the Government feel the need of ‘consulting’ the High Court, though mandatorily required by the Constitution as also by Rule 7 above quoted. Similarly while promoting the respondent No.1 from Grade-III to Grade-II of Assam Legal Service and appointing him as Joint Secretary and Legal Remembrancer, the High Court was not consulted. Merely because the State Government sent a copy of its notifications to the High Court, the requirement of consultation cannot be said to have been satisfied. Neither it was initiated by the State Government nor did the High Court exercise, avail or discharge its power, privilege and obligation of consultation. An invalidity caused by failure to comply with mandatory constitutional requirement, such as of consultation, cannot be cured by sheer inaction on the part of one or both of the functionaries between whom the requirement was to be fulfilled or by mere lapse of time.

A In almost all the States and Union Territories in the country services of judicial officers are loaned by High Courts to the governments for being utilized in litigation, judicial, law and legislative affairs departments of governments, by whatever name the departments may be called. The Secretary (Law) or a Legal Remembrancer serving under the government though a
B judicial officer whose services have been placed at the disposal of the government by the High Court has a crucial role to play. He is a vital link of communication between the High Court and the government and his relationship with the two wings strategically enables a healthy and appropriate relationship being maintained between the two. As held by this Court in
C *Sudhansu Sekhar Mishra's* case (supra), the State Government requesting the services of a competent judicial officer being made available to it and the High Court conceding to such request is by consent and willingness of the two. Neither the High Court can be compelled to spare a particular judicial officer nor can the High Court thrust upon the services of a particular judicial officer on the Government. A consensus can be arrived at by dialogue.
D However, if the services of a competent judicial officer who would otherwise be useful to the High Court were to be permanently appropriated by the State Government without the consent of the High Court that will be destructive of the very system and healthy practice apart from breach of a constitutional provision.

E We are, therefore, clearly of the opinion that there is no merit in the plea that the service of the respondent No.1 stood absorbed in the Assam Legal Services and the High Court could not have recalled the respondent No.1's deputation. Equally meritless is the plea that the lien of respondent No.1 in the State Judicial Services has come to an end and he had acquired a lien in Assam Legal Service. The Division Bench of the High Court was
F unnecessarily influenced by the factum of the High Court having recalled on 17.9.1996 its notification dated 10.4.1995 ignoring the reason behind recalling the notification. The notification, posting the respondent No.1 as a judicial officer, had to be recalled as it was not carried out and required to be recalled so as to issue another notification filling up judicial office lying vacant. So
G also the Division Bench ignored the impact of constitutional provision while forming an opinion that the lien of respondent No.1 in judicial service stood automatically terminated as the appointment of respondent No.1 to legal service, whilst he was a member of judicial service, was made without consultation with the High Court and hence was invalid. The question of respondent No.1 acquiring a lien in legal service and the lien in judicial
H service being terminated did not arise. The judgment of the Division Bench

of the High Court cannot be sustained and is liable to be set aside. A

The constitutional and legal position having been set at rest, the question which still remains to be decided is as to the manner in which the relief should be constructed in the peculiar facts and circumstances of this case. As noted earlier in this judgment, the learned counsel for the appellants made it very clear during the course of hearing that Gauhati High Court has not approached this Court as a litigant and the High Court was also not interested so much in the respondent No.1 being brought back to the fold of the judicial services as was its purpose to vindicate the correct position of law and service jurisprudence concerning members of judicial services. That has been done. B
The learned counsel for the respondent No.1 submitted that ever since 1986, C
i.e. for a period of little less than 16 years by this time, he has remained posted in legal service of the State and now he is nearing the end of his service career in view of just a few years having been left for his retirement. It was submitted at the end by the learned counsel for respondent No.1 that the respondent No.1 would have even given up his contest in this appeal by special leave filed by the Gauhati High Court but for the fact that his son is D
unfortunately not well and is suffering from serious neurological problem, taking treatment under the expert guidance and supervision of an expert neurologist at Gauhati, who is the Professor and Head of Department of Neurology in Gauhati Medical College. It would be difficult to shift his son from Gauhati to elsewhere except at grave risk to the health of his son. The E
learned counsel for the appellants made a statement under instructions that in the event of the respondent No.1 being brought back to judicial service the High Court would take a sympathetic and humane view of the problem of the respondent No.1 and he would be posted at a station wherefrom he can, without any inconvenience, continue neurological treatment of his son. It was F
also submitted that the High Court would have no serious objection to the respondent No.1 continuing in legal service and even on being treated as absorbed therein but subject to reservation that he was not posted either as Judicial Secretary or as Legal Remembrancer because that may cause some embarrassment to the High Court. The learned counsel for the State of Assam made a statement under instructions that if the respondent No.1 was allowed G
to be retained in State Legal Services, he would not be posted as Judicial Secretary. Whether the State was agreeable to not to post him as a Legal Remembrancer also, the learned counsel for the State sought for time for having instructions and later reported that she had not received any instructions and, therefore, was not in a position to give any assurance to the High Court or make any statement eitherway before this Court. That being the position H

A and keeping in view the triple factors: (i) that the respondent No.1 has been away from the main judicial stream and discharged executive functions only for a period of more than 15 years, (ii) that a marginal number of years is left for the retirement of respondent No.1, and (iii) that his son has a serious neurological problem which can be better taken care of by his continuance in legal services and consequently continued stay at Gauhati, we dispose of
B the appeal in terms of the following directions:-

(1) The judgment of the Division Bench of the High Court is set aside insofar as findings on questions of law are concerned;

C (2) Within a period of six weeks from today, the State of Assam shall take a decision if the respondent No.1 can be posted in an office other than that of Secretary (Judicial) and Legal Remembrancer in which case he shall continue in Assam Legal Service and need not be repatriated;

D (3) If the abovesaid direction cannot be carried out then at the end of six weeks the respondent No.1 shall be repatriated to the High Court as a member of judicial service and he shall be given a posting accordingly and consistently with the assurance given on behalf of the High Court.

E The appeal stands disposed of in the abovesaid terms without any order as to the costs.

N.J.

Appeal disposed of.