THE REGISTRAR (ADMN.), HIGH COURT OF ORISSA, CUTTACK

v.

SISIR KANTA SATAPATHY (DEAD) BY LRS. AND ANR. ETC.

SEPTEMBER 16, 1999

[DR. A.S. ANAND, C.J., K. VENKATASWAMI, G.B. PATTANAIK, S.P. KURDUKAR AND M. JAGANNADHA RAO, JJ.]

Constitution of India, 1950: Articles 233, 234 and 235 read with Article 311—Judicial Officers in State of Orissa—Compulsory retirement of—Authority competent to pass the order—Held, High Court retains the power of disciplinary control over subordinate judiciary including the power to initiate disciplinary proceedings against Judicial Officers, suspend them pending inquiry and to impose punishment on them—But as regards order of dismissal, removal, reduction in rank, termination of services or compulsory retirement, High Court is only the recommending authority and cannot itself pass the order—Such an order has to be passed by the State Governor—However, the recommendation of the High Court would be binding on the State Government—Subordinate Judiciary—Disciplinary control over.

First respondent in all the three appeals were Judicial Officers in the State of Orissa. The Review Committee of the High Court recommended that the respondents be retired prematurely in public interest. The said recommendation was accepted in the Full Court Meeting of the High Court held on 4.2.1987. Ultimately the respondents were retired prematurely as per the Notification dated 5.2.1987 issued by the High Court. Writ petitions were filed *inter alia,* on the ground that the High Court was not empowered to pass an order of compulsory retirement. The Division Bench allowed the writ petitions. Consequently, the respondents were allowed to join their duties.

After the judgment of the Division Bench, the High Court recommended to the State Government for compulsory retirement of the respondents. Meanwhile, the High Court filed appeals before this Court which stayed operation of the impugned judgment and directed that respondents would not work on the posts they had joined. On the other hand, the State Government

A did not act on the recommendations of the High Court to retire prematurely the respondents on the ground that the matter was pending in the Supreme Court.

Disposing of the appeals, the Court

B HELD : 1.1. In view of the plain language of Articles 233, 234 and 235, and in particular of Article 235 read with Article 311 of the Constitution, the High Court could not itself have passed an order of compulsory retirement, which amounts to termination of services. [478-B]

C *State of Haryana* v. *Inder Prakash Anand H.C.S. & Ors.*, [1976] 2 SCC 977 and *Registrar, High Court of Madras* v. *R. Rajiah, etc.*, [1988] 3 SCC 211, relied on.

1.2. While the High Court retains the power of disciplinary control over the subordinate judiciary, including the power to initiate disciplinary D proceedings, suspend them pending enquiries and impose punishment on them, but when it comes to the question of dismissal, removal, reduction in rank or termination of services of the Judicial Officers on any count whatsoever, the High Court becomes only the recommending authority and cannot itself pass such an order. The formal order to give effect to such a E decision has to be passed by the State Governor. [486-E]

The State of West Bengal v. *Nripendra Nath Bagchi*, [1966] 1 SCR 771; *Chief Justice of A.P. & Ors.* v. *L.V.A. Dixitulu & Ors. etc.*, [1979] 2 SCC 34; *State of U.P.* v. *Batuk Deo Pati Tripathi & Anr.*, [1978] 2 SCC 102; *Tej pal Singh* v. *State of U.P. & Anr.*, [1986] 3 SCC 604; *High Court of Judicature* F *for Rajasthan* v. *Ramesh Chand & Anr.*, [1998] 3 SCC 72; *Shyam Lal* v. *State of U.P.*, [1955] 1 SCR 26; *S.P. Gupta, etc.* v. *Union of India & Anr. etc.*, [1981] Supp. SCC 87 and *All India Judges' Association & Ors. etc.* v. *Union of India & Ors., etc.*, [1993] 4 SCC 288, referred to.

G 1.3. In the instant case, the decision of the Orissa High Court dated 4.2.87 (on the Administrative Side) was required to be forwarded to the Governor for passing an order of compulsory retirement. That was not done. It was wrong for the High Court to have passed the order of compulsory retirement itself. The judicial side of the High Court rightly decided the writ petition in favour of the Judicial Officers and held the order dated 4.2.1987 H (as issued by notification dated 5.2.1987) to be bad. There is no error in the

orders under appeal. [486-G] A

2.1. When, in pursuance of the Full Court Meeting held on 7.11.1991, the High Court recommended for compulsory retirement of the respondents, the Government could not have declined to act on the said recommendation. The course open to the Government was to forward the recommendation of the High Court to the Governor who would have passed an order in accordance with the recommendation made by the High Court because the recommendation of the High Court was binding on the Government. [488-C-G] B

State of Haryana **v.** *Inder Prakash Anand H.C.S. & Ors.,* **[1976] 2 SCC 977, relied on** C

2.2. By not making an order of compulsory retirement on the recommendation of the High Court, a peculiar situation was created in the sense that the respondent-Judicial Officers were neither in service nor were they technically out of service. They, however, did not perform any work. In the circumstances, the Governor of State would pass a formal order of compulsory retirement of Judicial Officers on the basis of the recommendation made in the Full Court meeting of the High Court on 7.11.1991, with effect from the date when the recommendation was received by the Government, i.e. 2.12.1991. The Judicial Officers (which would include legal representatives of the deceased Judicial Officer) would, thus, be entitled to their salary, allowances and all other consequential benefits till 2.12.1991. D E

[488-H; 489-A-D]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4751 of 1992 etc.

From the Judgment and Order dated 8.8.91 of the Orissa High Court in O.J.C. No. 1594 of 1988. F

Ashok Kumar Panda, (Jayant Das) Advocate General for the State of Orissa, M.N. Krishnamani, K.K. Patel, T.K. Pradhan, R.P. Wadhawani, Y. Prabhakara Rao, Radha Shyam Jena, C.S. Bhardwaj and Debasis Misra for the appearing parties. G

In-person (N.P.) for Respondent No. 1 in C.A. Nos. 4752-53/92.

The Judgment of the Court was delivered by

K. VENKATASWAMI, J. An independent judiciary is one of the basic H

A features of the Constitution of the Republic. In this case, however, we are not concerned with the various provisions of the Constitution guaranteeing independence of judiciary but with a limited issue about the scope and extent of control of the High Court over the subordinate judiciary to the exclusion of the executive for maintenance of its independence. Our Constitution has zealously guarded the independence of judiciary. In *S.P. Gupta, etc.* v. *Union* B *of India & Anr., etc.*, [1981] Supp. SCC 87, this Court held that independence of judiciary is doubtless a basic structure of the Constitution but the said concept of independence has to be confirmed within the four corners of the Constitution and cannot go beyond the Constitution. This Court in *All India Judges' Association & Ors., etc.* v. *Union of India & Ors., etc.*, [1993] 4 SCC C 288 held :

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

By way of a note of caution we may add that the control vested in the High Court over the subordinate judiciary though absolute and exclusive, it G has to be exercised without usurping the power vested in the Executive under the Constitution. This necessarily brings us to the consideration of Articles 233, 234 and 235 of the Constitution of India. Those Articles read thus :

"*Article 233. Appointments of district judges.*—(1) Appointments of persons to be, and the posting and promotion of, district judges in H any State shall be made by the Governor of the State in consultation

with the High Court exercising jurisdiction in relation to such State. A

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

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Article 234. Recruitment of persons other than district judges to the judicial service.—Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State. C

Article 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 D 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 under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law." E

The backdrop in which the interpretation of the above Articles comes into focus is given below.

The first respondent in Civil Appeal No. 4751/92 at the relevant time F was officiating as Chief Judicial Magistrate in the Orissa Superior Judicial Service (Junior Branch). The first respondent in Civil Appeal Nos. 4752 and 4753 were officiating in Class-I of the Orissa Judicial Service. The Review Committee constituted by the Full Court of the Orissa High Court met on 30.1.87 and decided to recommend to the Full Court that the first respondent G in each of the appeals be retired prematurely in public interest. The recommendation of the Review Committee was accepted by the Full Court, which met on 4.2.87. Pursuant to that, the first respondent in each of the appeals were retired prematurely as per the Notification issued by the High Court on 5.2.87. That Notification was challenged in the High Court mainly on the ground that the High Court was not vested with the power of making H

A an order of compulsory retirement. It was also challenged on the ground that there were no materials against them to make the impugned order.

That the High Court could not itself have passed an order of compulsorily retirement as above, which amounts to termination of service is borne out from the plain language of the above Articles and in particular of Article 235 B read with Article 311. This question has been debated and answered by this Court in a number of cases.

In *The State of West Bengal* v. *Nripendra Nath Bagchi,* [1966] 1 SCR 771, a Constitution Bench of this Court while setting aside an order of C dismissal of an officiating District and Sessions Judge passed after consulting the State Public Service Commission but without consulting the High Court, elaborately considered the scope of Article 235. Hidayatullah, J., (as His Lordship then was) speaking for the Bench observed that there is nothing in Article 311 which compels the conclusion that the High Court is ousted of the jurisdiction to hold the inquiry if Article 235 vested some power in it. The D control which is vested in the High Court is a complete control subject only to the power of the Governor into the matter of appointment (including dismissal and removal) and posting and promotion of District Judges. Within the exercise of the control vested in the High Court, the High Court can hold enquiries, impose punishments other than dismissal or removal subject however E to the conditions of service, to a right of appeal if granted by the conditions of service, and to the giving of an opportunity of showing cause as required by clause (2) of Article 311, unless such an opportunity is dispensed with by the Governor acting under the provisos (b) and (c) to that clause.

In *State of Haryana* v. *Inder Prakash Anand H.C.S. & Ors.,* [1976] 2 F SCC 977, a four-Judge Bench of this Court had an occasion to consider the scope and width of Article 235 of the Constitution. That was a case in which the State Government compulsorily retired a senior Subordinate Judge though the High Court recommended only for his reversion. This Court held :

G Para 15—This Court in *Bagchi's* case said that control vested in the High Court is over the conduct and discipline of the members of the Judicial Service. Orders passed in disciplinary jurisdiction by the High Court are subject to an appeal as provided in the conditions of service. The High Court further deals with members of the Judicial Service in accordance with the rules and conditions of service. This H Court in *Bagchi's* case said that the word "deal" points to disciplinary

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and not merely administrative jurisdiction. *The order terminating the appointment of a member of the service otherwise than upon his reaching the age fixed for superannuation will be passed by the State Government on the recommendation of the High Court. This is because the High Court is not the authority for appointing, removing, reducing the rank or terminating the service.*

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Para 16 - It is true that the fixation of the age of superannuation is the right of the State Government. The curtailment of that period under rule governing the conditions of service is a matter pertaining to disciplinary control as well as administrative control. Disciplinary control means not merely jurisdiction to award punishment for misconduct. It also embraces the power to determine whether the record of a member of the service is satisfactory or not so as to entitle him to continue in service for the full term till he attains the age of superannuation. Administrative, judicial and disciplinary control over members of the judicial Service is vested solely in the High Court. Premature retirement is made in the exercise of administrative and disciplinary jurisdiction. It is administrative because it is decided in public interest to retire him prematurely. It is disciplinary because the decision was taken that he does not deserve to continue in service up to the normal age of superannuation and that it is in the public interest to do so.

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Para 18 - *The control vested in the High Court is that if the High Court is of opinion that particular judicial officer is not fit to be retained in service the High Court will communicate that to the Governor because the Governor is the authority to dismiss, remove, reduce in rank or terminate the appointment.* In such cases it is the contemplation in the Constitution that the Governor as the Head of the State will act in harmony with the recommendation of the High Court. If the recommendation of the High Court is not held to be binding on the State consequences will be unfortunate. It is in public interest that the State will accept the recommendation of the High Court. *The vesting of complete control over the subordinate judiciary in the High Court leads to this that the decision of the High Court*

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A *in matters within its jurisdiction will bind the State. "The Government will act on the recommendation of the High Court. That is the broad basis of Article 235".*

In *State of U.P.* v. *Batuk Deo Pati Tripathi & Anr.*, [1978] 2 SCC 102, a Constitution Bench of this Court again had an occasion to consider the B validity of an order of compulsory retirement passed by the State Governor on the recommendation of the Administrative Committee of the High Court. The High Court set aside the order compulsorily retiring the District Munsiff on the ground that the recommendation by the Administrative Committee cannot be construed as the recommendation of the High Court (Full Court). C Reversing the judgment of the High Court and approving the procedure of the recommendation through the Administrative Committee, this Court observed:

"Here, the decision to compulsory retire the respondent was taken by the Judges of the High Court itself, though not by all. If some but D not all Judges of the High Court participate in a decision relating to a matter which falls within the High Court's controlling jurisdiction over subordinate courts, the High Court does not efface itself by surrendering its poet to an extraneous authority. The procedure adopted by the High Court under its Rules is not subversive of the independence of the subordinate judiciary, which is what Article 235 E recognises and seeks to achieve.

The learned Judges further held that the recommendation made by the Administrative Committee cannot be said to suffer from any legal or constitutional infirmity.

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In *Chief Justice of A.P. & Ors.* v. *L.V.A. Dixitulu & Ors. etc.*, [1979] 2 SCC 34, a Constitution Bench of this Court again considered the validity of an order of compulsory retirement passed by the State Governor on the recommendation of the High Court. That order was challenged before the G State Administrative Tribunal and this Court while holding that the State Administrative Tribunal had no jurisdiction to entertain the appeal, observed as follows :

"Respondent 1, Shri V.V.S. Krishnamurthy, in that appeal was, at the material time, a member of the Andhra Pradesh State Judicial Service. H He attained the age of 50 years on November 24, 1974. He was

prematurely retired, in public interest, by an order dated September 29, 1975 of the State Government on the recommendation of the High Court. Before the Government passed this order, a Committee of Judges appointed by the High Court, considered the entire service record of respondent 1 and records of other Judicial Officers and decided to prematurely retire the first respondent in public interest. A B

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The interpretation and scope of Article 235 has been the subject of several decisions of this Court. The position crystalised by these decisions is that the control over the subordinate judiciary vested in the High Court under Article 235 is exclusive in nature, comprehensive in extent and effective in operation. It comprehends a wide variety of matters. Among others, it includes : C

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(g) Premature or compulsory retirement of Judges of the District Courts and of Subordinate Courts. F

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In the last-mentioned case (Inder Prakash Anand) the Government servant was officiating in the cadre of District Judges. The High Court recommended that he should be reverted to his substantive post of senior Subordinate Judge/Chief Judicial Magistrate and, as such, allowed to continue in service till the age of 58 years. Contrary to the recommendation of the High Court, the State Government passed an order under Rule 5.32(c) of the Punjab Civil Service Rules, *compulsorily* retiring him from service at the age of 55 years. Holding that the order G H

A of compulsory retirement was invalid, this Court stressed that the power of deciding whether a judicial officer should be retained in service after attaining the age of 55 years upto the age of 58 years, vests in the High Court, and to hold otherwise "will seriously affect the independence of the judiciary and take away the control vested in the High Court". The formal order of retirement, however, is passed B by the Governor acting on the recommendation of the High Court, that being "the broad basis of Article 235". It was explained that "in such cases it is the contemplation in the Constitution, that the Governor as the Head of the State will act in harmony with the recommendation of the High Court". It was concluded that "the vesting of complete C control over the Subordinate Judiciary in the High Court leads to this that the decision of the High Court in matters within its jurisdiction will bind the State". *In other words, while in form, the High Court's decision to compulsorily retire a subordinate judicial officer in the exercise of its administrative or disciplinary jurisdiction under Article 235 is advisory, in substance and effect, it is well-nigh peremptory."*

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In *Tej Pal Singh* v. *State of U.P. & Anr.*, [1986] 3 SCC 604, a Division Bench of this Court had occasion to consider a question whether the impugned order of premature retirement passed by the Governor without having before him the recommendation of the Administrative Committee or of the Full Court E was void and ineffective. The learned Judges, after referring to earlier judgments of this Court, held as follows :

"Para 4 - Article 235 of the Constitution provides that the control over district courts and courts subordinate thereto including the posting and promotion of and the grant of leave to persons belonging F to the judicial service of the State and holding any post inferior to the post of District Judge shall be vested in the High Court. It has been held in State of *U.P.* v. *Batuk Deo Pati Tripathi* that premature retirement of subordinate courts is a matter which falls squarely within the power of control vested in the High Courts by Article 235 of the Constitution. *Without the recommendation of the High Court it is not* G *open to the Governor to issue an order retiring prematurely Judges of District Courts and of subordinate courts.*

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H Para 13 - ....In the instant case the Government had sought

the opinion of the High Court regarding the question whether the appellant could be prematurely retired and that question was certainly a very important matter from the point of view of the subordinate judicial service. The Administrative Judge before giving his opinion in support of the view expressed by the government should have either circulated the letter received from the government amongst the members of the Administrative Committee or placed it before them at a meeting. He did not adopt either of the two courses. But he on his own forwarded his opinion to the government stating that the appellant could be prematurely retired. That he could not do. Ordinarily, it is for the High Court, on the basis of assessment of performance and all other aspects germane to the matter to come to the conclusion *whether* any particular judicial officer under its control is to be prematurely retired and once the High Court comes to the conclusion that there should be such retirement, the Court recommends to the Governor to do so. The conclusion is to be of the High Court since the control vests therein. Under the Rules obtaining in the Allahabad High Court, the Administrative Committee could act for and on behalf of the government proposal was of no consequence and did not amount to satisfaction of the requirement of Article 235 of the Constitution. It was only after the Governor passed the order on the basis of such recommendation, the matter was placed before the Administrative Committee before the order of retirement was actually served on the appellant. The Administrative Committee not have dissented from the order of Governor or the opinion expressed by the Administrative Judge earlier. But it is not known what the Administrative Committee would have done if the matter had come up before it before the Governor had passed the order of premature retirement. In any event the deviation in this case is not a mere irregularity which can be cured by the ex post facto approval given by the Administrative Committee to the action of the Governor after the order of premature retirement had been passed. The error committed in this case amounts to an incurable defect amounting to an illegality. We may add that while it may be open to the government to bring to the notice of the High Court all materials having a bearing on the conduct of a District Judge or a subordinate judicial officer, which may be in its possession, the government cannot take the initiative to retire prematurely a District Judge or a subordinate judicial officer. Such initiative should rest with the High Court."

A In *Registrar, High Court of Madras* v. *R. Rajiah, etc.*, [1988] 3 SCC 211, this Court had an occasion to consider the validity of an order of compulsory retirement passed by the High Court. The learned Judges held that the proper procedure for the High Court was to recommend the case for compulsory retirement and it was for the Governor on whom the recommendation of the High Court was binding, to pass the formal order. This Court in the said case B observed as follow :

> "The test of control is not the passing of an order against a member of the subordinate judicial service, but the decision to take such action. It may be that so far as the members of the subordinate judicial service are concerned, it is the Governor, who being the appointing C authority, has to pass an order of compulsory retirement or any order of punishment against such a member. But passing or signing of such orders by the Governor will not necessarily take away the control of the High Court vested in it under Article 235 of the Constitution. An action against any government servant consists of two parts. Under D the first part, a decision will have to be made whether an action will be taken against the government servant. Under the second part, the decision will be carried out by a formal order. The power of control envisaged under Article 235 of the Constitution relates to the power making a decision by the High Court against a member of the subordinate judicial service. Such a decision is arrived at by holding E an enquiry by the High Court against the member concerned. After the High Court comes to the conclusion that some action either in the nature of compulsory retirement or by the imposition of a punishment, as the case may be, has to be taken against the member concerned, the High Court will make a recommendation in that regard to the F Governor and the Governor will act in accordance with such recommendation of the High Court by passing an order in accordance with the decision of the High Court. The Governor cannot take any action against any member of a subordinate judicial service without, and contrary to, the recommendation of the High Court.
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> It is apparent from the observation extracted above that this Court also understood the power of control of the High Court as the power H of taking a decision against a member of the subordinate judicial

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> service. The High Court is the only authority that can take such a decision. The High Court will hold an enquiry and decide on the result of such enquiry whether any action will be taken against a member of the subordinate judicial service. If it comes to the conclusion that such an action is required to be taken, it will make a recommendation in that regard to the State Governor who will make an order in accordance with the recommendation of the High Court.

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> The control of the High Court, as understood, will also be applicable in the case of compulsory retirement in that the High Court will, upon an enquiry, come to a conclusion whether a member of the subordinate judicial service should be retired prematurely or not. If the High Court comes to the conclusion that such a member should be prematurely retired, it will make a recommendation in that regard to the Governor inasmuch as the Governor is the appointing authority. The Governor will make a formal order of compulsory retirement in accordance with the recommendation of the High Court."

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No doubt, the learned Judges also found that there was no sufficient material warranting an order of compulsory retirement in that case.

In *High Court of Judicature for Rajasthan* v. *Ramesh Chand Paliwal & Anr.*, [1998] 3 SCC 72, a two-Judge Bench of the Court while construing the scope and extent of Articles 233 to 235 of the Constitution, held as follows:

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> "This article shows that the High Court has to exercise its administrative, judicial and disciplinary control over the members of the Judicial Service of the State. The word "control", referred to in this article, is used in a comprehensive sense to include general superintendence of the working of the subordinate courts, disciplinary control over the Presiding Officers of the subordinate courts and to recommend the imposition of punishment of dismissal, removal and reduction in rank or compulsory retirement. "Control" would also include suspension of a member of the Judicial Service for purposes of holding a disciplinary enquiry, transfer, confirmation and promotion. (See *State of Haryana* v. *Inder Prakash Anand* and *State of U.P.* v. *Batuk Deo Pati Tripathi*). In *State of Gujarat* v. *Ramesh Chandra Mashruwala* it was held that "control" in Article 235 means exclusive and not dual control. (See also *Chief Justice of A.P.* v. *L.V.A. Dixitulu*;

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A *State of W.B.* v. *Nriendra Nath Bagchi*)."

On going through the judgments of this Court right from *Shyam Lal* v. *State of U.P.*, [1955] 1 SCR 26 down to *High Court of Judicature for Rajasthan* v. *Ramesh Chand Paliwal & Anr.*, [1998] 3 SCC 72, one cannot but reach one conclusion regarding the power of the High Court in the matter of ordering B compulsory retirement. That conclusion is that the High Courts are vested with the disciplinary control as well as administrative control over the Members of the Judicial Service exclusively, but that does not mean that they can also pass orders of dismissal, removal, reduction in rank or termination from service while exercising administrative and disciplinary control over the C Members of Judicial Service. Undoubtedly, the High Courts alone are entitled to initiate, to hold enquiry and to take a decision in respect of dismissal, removal, reduction in rank or termination from service, but the formal order to give effect to such a decision has to be passed only by the State Governor on the recommendation of the High Court. It is well settled again by a catena of decisions of this Court that the recommendation of the High Court is D binding on the State Government/Governor [vide para 18 in *Inder Prakash Anand's* case (supra)].

We are clearly of the view that while the High Court retains the power of disciplinary control over the subordinate judiciary, including the power to initiate disciplinary proceedings, suspend them pending enquiries and impose E punishment on them but when it comes to the question of dismissal, removal, reduction in rank or termination of the services of the judicial officer, on any count whatsoever, the High Court becomes only the recommending authority and cannot itself pass such an order [vide *Inder Prakash Anand's* case and *Rajiah's* case (supra)].

F In the instant case, the decision of the Orissa High Court dated 4.2.87 (on the Administrative Side) was required to be forwarded to the Governor for passing an order of compulsorily retirement. That was not done. It was wrong for the High Court to have passed the order of compulsory retirement itself. The judicial side of the High Court rightly decided the Writ Petition in G favour of the judicial officers and held the order dated 5.2.87 to be bad. In the words of the Division Bench of the High Court :

> "There is a stronger constitutional objection to accept the submission of Shri Nayak for regarding the High Court as the appointing authority of the Chief Judicial Magistrate on the basis of what has been provided H in rule 10 of the Orissa Superior Judicial Service Rules, 1963, inasmuch

as it has been laid down in Article 234 of the Constitution that appointments of persons other than District Judges to the judicial service of a State shall be made by the Governor of the State in accordance with the rules made by him in that behalf. The aforesaid rules are one set of such rules. So, no provision in the rules could have altered the constitutional position that the Governor of the State is the appointing authority of persons other than District Judges also. Conferment of this power on the High Court by virtue of what is stated in rule 10 of the Orissa Superior Judicial Service Rules would have clashed with the constitutional mandate. We would therefore, not accept because of what is stated in rule 10 that the High Court is the appointing authority of a Chief Judicial Magistrate."

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In view of all that is stated above, we would hold that the High Court is not the appointing authority of Chief Judicial Magistrates to clothe it with the power of compulsory retirement conferred by the First proviso to rule 71 (a) of the Orissa Service Code. In this connection, may we also point out that it would be really incongruous where, though the High Court cannot retire a Munsif, or for that matter a District Judge, as fairly conceded by Shri Nayak it would be in a position to retire a Chief Judicial Magistrate. We do not think if the concerned provisions permit us to take this view.

Before closing this aspect of the discussion, we may say that we are conscious of the legal position that passing of an order of compulsory retirement by the Governor is a formal matter as stated in *Rajiah's* case (supra) because, according to this decision, the Governor in such cases merely acts on the recommendation of the High Court by signing an order in that regard; but the procedure of the Governor formally passing an order of retirement has to be complied with. So long as there is no formal order of the Governor, the compulsory retirement as directed by the High Court cannot take effect, as opined in *Rajiah's* case itself.

Having come to the aforesaid conclusion, it is not necessary to deal with the second submission of Shri Ray that there were no materials in the present case to order for the compulsory retirement

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The judgment of the Division Bench of the High Court is strictly in accord with the catena of judgments referred to above and in particular with the judgment in *Rajiah's* case (supra). We, therefore, see no error in the orders under appeal.

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Had the matters rested here, there would have been no problem but the subsequent developments have given a new turn and twist to the case.

After the judgment of the Division Bench of the High Court, it appears, the Full Court on the Administrative Side on 7.11.91 decided to make a C recommendation to the Government for compulsory retirement of the concerned Judicial Officers. That recommendation was forwarded to the Government on 26.11.91. In the meanwhile, the High Court had also put in issue the judgment of the Division Bench through the Special Leave Petitions out of which the present appeals have arisen and an interim order dated 19.12.91 made at the D notice stage was as follows:—

> "Issue notice on the S.L.P. and I.A. No. 1/91 and tag on to S.L.P. (C) No. 18266/91. In the meantime, the operation of the impugned judgment shall remain stayed.
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> E It is stated by the Learned counsel for the respondent No. 1 that he was permitted to join. In view of our present order he will not now work in the post he has joined.
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> Once month's time is allowed to the respondent No. 1 for filing his Counter Affidavit and two weeks thereafter to the petitioner for F rejoinder."

After the recommendation of the Full Court was received, the Government on 2.12.91 chose not to proceed further on the plea that the matter was pending in the Supreme Court. They declined to act further on the recommendation. This, the Government could not have done. The course G open to the Government was to forward the recommendation of the High Court to the Governor who would have passed an order in accordance with the recommendation made by the High Court as has been held in Inder *Prakash Anand's* case (supra) because the recommendation of the High Court was binding on the Government.

H By not making an order of compulsory retirement on the recommendation

of the High Court, a peculiar situation was created in the sense that the Judicial Officers were neither in service nor were they technically out of service. They, however, did not perform any work. The question, therefore, now arises as to what is the manner in which relief can be moulded to balance equities between the parties by this Court, so that the litigation itself is given a quietous.

The first respondent in Civil Appeal No. 4751/92 has died pending appeal. His legal representatives had been brought on record. The first respondent in other two appeals have since retired.

Mr. Jayant Das, learned Advocate General, appearing for the State Government, as well as learned counsel appearing for the High Court rightly agreed with the suggestion made on behalf of the Judicial Officers that on the basis of the recommendation made by the Full Court of the High Court on 7.11.91, the Governor of State be requested to pass a formal order of compulsory retirement of Judicial Officers with effect from the date when the recommendation was received by the Government, i.e. 2.12.91. The Judicial Officers (which would include legal representatives in the case of deceased 1st respondent in C.A. No. 4751/92) would, thus, be entitled to their salary, allowances and all other consequential benefits till 2.12.91. This suggestion appeals to us also as it will balance the equities between the parties and set at naught a controversy which has unnecessarily remained pending for so long. The arrears as per the above terms shall be paid to the Judicial Officers within three months from the date of receipt of this judgment.

The appeals stand disposed of accordingly. There will be no order as to costs.

R.P. Appeals disposed of.