

(2004) 05 GAU CK 0033

In the Gauhati High Court

Case No : WP (C) No"s. 5628 and 5832 of 2003

Jodhraj Baid

APPELLANT

Vs

State of Mizoram and Others

RESPONDENT

Date of Decision : 06-05-2004

Acts Referred:

Administer Justice Rules, 1937 — Rule 1, 10, 11, 14, 14A
Administration of Justice Rules, 1953 — Rule 9
Constitution of India, 1950 — Article 21, 217(1), 217(2), 226, 233
Criminal Procedure Code, 1973 (CrPC) — Section 1(2), 10, 11, 12, 13
Gauhati High Court Services (Appointment, Conditions of Service and Conduct) Rules, 1967 — Rule 2
Penal Code, 1860 (IPC) — Section 120B
Prevention of Corruption Act, 1988 — Section 12, 13(1), 13(2), 3, 3(2)
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 9, 9(4), 9(6)

Citation : (2005) 2 GLR 393 : (2006) 2 GLT 673 : (2004) 3 GLT 30

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : N. Dutta, B. Bhuyan, S.S. Dey and P.N. Goswami, for the Appellant; B.P. Katakey, A.S. Dasgupta, K.P. Pathak, P. Pathak and A. Dasgupta, for the Respondent

Judgement

B.K. Sharma, J.—These writ proceedings have been initiated seeking a writ of quo-warranto towards removal of the respondent No. 5 who has been designated as Special Judge, Mizoram, Aizawl on ground of being not qualified to hold the office as contemplated under the provisions of Prevention of Corruption Act, 1988 and to restrain him from proceeding in any manner with the trial of the particular criminal case. A further prayer has been made to transfer the criminal trial from Mizoram to the court of Special Judge, Assam, Guwahati.

2. The basic facts are not in dispute. One Dr. Zairema of Zarkawt, Aizawl who is allegedly member of the political party called Mizo Peoples Conference lodged an FIR on 4.10.1996 before the Superintendent of Police, Anti-Corruption Branch, Mizoram making a number of allegations against the then Chief Minister of

Mizoram, Shri Lal Thanhawla and involving the petitioners and some others, on the basis of some reported discoveries made during the course of search investigation conducted by the Income Tax department in the business premises of the petitioner in WP(C) No. 5628/2003 where the petitioner in WP(C) No. 5832/2003 is a part time Accountant. The informant alleged that it was reliably learnt that the seized documents revealed a number of things including details regarding payments made by the petitioner in WP(C) No. 5628/2003 on account of construction of the Chief Minister's building, besides for some other purposes. It was also alleged that the seized documents reportedly revealed payment of donations to the then Chief Minister's political party fund through some local firms and that the business operation of the said petitioner is carried out through some local Mizo firms so as to claim exemption in Income Tax liability.

3. On receipt of the aforesaid FIR, the police registered a case being Aizwal P.S. Case No. 631/96 u/s 120B of IPC read with Sections 7/12/13(1)(d)/13(2) of the Prevention of Corruption Act, 1988 against the petitioners and said Sri Lal Thanhawla. According to the petitioners the police started harassing them after the lodging of the said FIR. According to them the entire action towards lodging of the FIR is motivated by political interest in view of the then ensuing assembly election in Mizoram held in October 2003 and in the process the petitioners have also been made the victim of the circumstances. The petitioners obtained pre-arrest bail. In due course the Government of Mizoram in the Home Department accorded sanction for prosecution of the accused persons including the petitioners. After framing of charge against the petitioners and said Shri Lal Thanhawla, the Special Judge, Mizoram fixed 6.8.2003 as the date for appearance in connection with the said case registered and numbered as Criminal Trial Case No. 1626/96.

4. The basic thrust towards the prayers made in the writ petition are two fold, viz. (1) the Special Judge appointed for the purpose of trial of the case is not qualified to be appointed as such u/s 3 of the Prevention of Corruption Act and (2) the entire action in launching the criminal case against the petitioners and Shri Lal Thanhawla being politically motivated and the Special Judge entrusted with the trial being essentially and Executive Officer under the control of the Government of Mizoram and pressure being exerted on him by the Government, the petitioners would be denied a fair trial. The petitioners in tune with the prayer for issuance of a writ of quo-warranto, have also put challenge to the notifications dated 6.2.1997 and 4.9.1997 issued by the Registrar (Judicial) of this court and the Government of Mizoram in the Department of Personnel and Administrative Reforms, Civil Service Wing respectively investing the officers including the respondent No. 5, the powers of Sessions Judge and transferring and posting of the respondent No. 5 as Special Judge under the Prevention of Corruption Act for the newly constituted court as per the notification dated 19.8.1997 as mentioned in the said notification dated 4.9.1997 respectively.

5. As regards the first ground of attack, it is the case of the petitioners that the

respondent No. 5 who has been invested with the power of Sessions Judge and posted as Special Judge under the Prevention of Corruption Act is not qualified to be so appointed as per provisions of Section 3(2) of the said Act. The provisions of Section 3 are quoted below :

3. Power to appoint Special Judges. - (1) The Central Government or the State Government may, by notification in the Official Gazette, appoint as many Special Judges as may be necessary for such area or areas or for such case or group cases as may be specified in the notification to try the following offences, namely : -

(i) any offence punishable under this Act; and

(ii) any conspiracy to commit or any attempt to commit or any abetment or any of the offences specified in Clause (a).

(2) A person shall not be qualified for appointment as a special Judge under this Act unless he is or has been a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure, 1973.

Thus it will be seen that a person shall not be qualified for appointment as a Special Judge, unless he is or has been a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure, 1973. It is on this count, it is the case of the petitioners that the respondent No. 5 being neither a Sessions Judge nor having held that office at any point of time under the Code of Criminal Procedure, 1973, is not entitled to be appointed as Special Judge. Their case is that the said respondent is essentially an Executive Officer under the control of the Government of Mizoram there being no separation of judiciary from the executive in the State of Mizoram.

6. The official respondents have responded to the notice issued in the writ proceedings and two separate affidavits have been filed, one by the State of Mizoram through its Chief Secretary and another by the Registrar General, Gauhati High Court. In both the affidavits, it is the stand of the respondents that for the purpose of construction of reference to the expression "Sessions Judge" in so far as it relates to the State of Mizoram, a new Sub-section (5) was added to Section 3 of the Cr.PC by the Central Government in exercise of its power under proviso to Section 1(2) of the said Code. By virtue of Sub-section 5 of Section 3, any reference to the "Court of Session" or "Sessions Judge" in relation to the State of Mizoram has to be construed as the "District Magistrate" or the "Additional District Magistrate" until the "Court of Sessions" are constituted. For a better appreciation of the stand of the respondents in the context of Sub-section 5 of Section 3 of the Cr.PC under the head "Construction of references", Section 3 of the Cr.PC is quoted below :

3. Construction of references. - (1) In this Code,-

(a) any reference, without any qualifying words, to a Magistrate, shall be construed, unless the context otherwise requires,-

(i) in relation to an area outside the metropolitan area, as a reference to a Judicial Magistrate;

(ii) in relation to a metropolitan area, as a reference to a Metropolitan Magistrate;

(b) any reference to a Magistrate of the second class shall, in relation to an area outside a metropolitan area, be construed as a reference to a Judicial Magistrate of the second class, and, in relation to a Metropolitan Magistrate;

(c) any reference to a Magistrate of the first class shall,-

(i) in relation to a metropolitan area, be construed as a reference to a Metropolitan Magistrate exercising jurisdiction in that area;

(ii) in relation to any other area, be construed as a reference to a Judicial Magistrate of the first class exercising jurisdiction in that area;

(d) any reference to the Chief Judicial Magistrate shall, in relation to a Metropolitan Magistrate exercising jurisdiction in that area.

(2) In this Code, unless the context otherwise requires, any reference to the Court of a Judicial Magistrate shall in relation to a metropolitan area, be construed as a reference to the Court of the Metropolitan Magistrate for that area.

(3) Unless the context otherwise requires, any reference in any enactment passed before the commencement of this Code,-

(a) to a Magistrate of the first class, shall be construed as a reference to a Judicial Magistrate of the first class;

(b) to a Magistrate of the second class or of the third class, shall be construed as a reference to a Judicial Magistrate of the second class;

(c) to a Presidency Magistrate or Chief Presidency Magistrate, shall be construed as a reference, respectively, to a Metropolitan Magistrate or the Chief Metropolitan Magistrate;

(d) to any area which is included in a metropolitan area, as a reference to such metropolitan area, and any reference to a Magistrate of the first class or of the second class in relation to such area shall be construed as a reference to the Metropolitan Magistrate exercising jurisdiction in such area.

(4) Where, under any law, other than this Code, the functions exercisable by a Magistrate relate to matters-

(a) which involve the appreciation or sifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate, or

(b) which are administrative or executive in nature, such as, the granting of a

license, the suspension or cancellation of a license, sanctioning a prosecution or withdrawing from a prosecution, they shall subject as aforesaid, be exercisable by an executive Magistrate.

State amendment

ARUNACHAL PRADESH & MIZORAM :- Amended by Notification No. Jud.25/74, dated 2.4.1974.

After Sub-section (4), the following sub-section shall be inserted, namely :-

"(5) Notwithstanding anything contained in the foregoing provisions of this section -

(i) any reference in such of the provisions of this Code, as applied to the Union Territories of Arunachal Pradesh and Mizoram, to the Courts mentioned in Col.(1) of the Table below shall, until the Courts of Session and Courts of Judicial Magistrate are constituted in the said Union Territories be construed as references to the Court of Magistrate mentioned in the corresponding entry in Col. (2) of that Table.

TABLE

1 2. Court of Session or Session Judge or Chief Judicial District Magistrate Magistrate.

Magistrate or Magistrate of the first class or Judicial Executive Magistrate

Magistrate of the first class

(iii) the functions mentioned in Clause (a) of Sub-section (4) shall be exercisable by an executive Magistrate."

7. According to the respondents, by virtue of Section 3(5) of the Cr.PC, the reference to "Sessions Judge" and "Additional Sessions Judge" in Section 3(2) of the Prevention of Corruption Act, 1988 in so far as it relates to the State of Mizoram has to be construed to mean "District Magistrate" or "Additional District Magistrate" implying thereby that "District Magistrate" or "Additional District Magistrate" appointed under the Cr.PC in Mizoram can be appointed as "Special Judge" for the purpose of the Prevention of Corruption Act. Referring to the earlier notifications it is the stand of the Government of Mizoram that the respondent No. 5 had already worked as Additional District Magistrate, Lunglei and Aizawl u/s 20 of the Cr.PC. A further reference has been made to the notification dated 6.2.1997 by which the said respondent has not invested with the powers of Sessions Judge by the Gauhati High Court. It has also been averred that the said respondents was appointed as Judge of the Special Court with concurrence of the High Court. The further stand in the affidavit filed by the State of Mizoram is that the conferment of powers on Magistrates is not necessarily linked with the separation of judiciary and that had it been so, then para 5 of the Sixth Schedule to the Constitution of India must have contained the

provision of conferment of Sessions power on the Judicial Magistrate of the District Council which are not under the exclusive control of the High Court.

8. The stand in the affidavit filed by the Registrar General, Guahati High Court inter alia is that since the Judiciary has not been separated from the Executive in the State of Mizoram, the Government of Mizoram approached the High Court with a proposal for constitution of the Court of Special Judge under the Prevention of Corruption Act and for appointment of the respondent No. 5, an officer of Mizoram Judicial Service as Special Judge and accordingly in exercise of power conferred by Section 32 of the Cr.PC, the High Court invested the respondent No. 5 with the powers of Sessions Judge by the aforesaid notification dated 6.2.1997. Reliance has been placed on the decision of Division Bench of this Court as reported in (1994) 2 GLR 178 (Lal Siamkunga v. State of Mizoram) in support of the stand.

9. The petitioners have filed their affidavit-in-reply to the affidavit filed by the State of Mizoram, reiterating the stand in the writ petition that the respondent No. 5 has been appointed illegally and in violation of the provisions of Section 3 of the Prevention of Corruption Act, 1988. According to them the notification dated 6.2.1997 issued u/s 32 of the Cr.PC provides only the mode of conferring powers, but the same does not itself provide for any source of power. They assert that the jurisdiction of the High Court to confer power upon any person under the Code has to be located in any substantive provision of law, which can enable the High Court to exercise the jurisdiction of the empowerment under the Code. Section 32 of the Code is not a substantive provision of law wherein such power can be located. According to them Section 32 can be pressed into operation only when the power can be located elsewhere. Section 32 of the Code by itself does not enable the High Court to confer any power under the Code.

The respondent No. 5 not being appointed as a Judicial Officer at any point of time by the High Court cannot be invested with the powers of Sessions Judge as has been done by the notification dated 6.2.1997. According to them there is also no material to show that the posting and promotion of the officers including the respondent No. 5 had ever been done or made in consultation with the High Court as contemplated under the law. Thus they assert that the respondent No. 5 is, therefore, outside the purview of the expression "District Judge" as stipulated under Chapter 6 of the Constitution of India and the service to which the respondent No. 5 belongs is not a "Judicial Service" within the meaning of Article 236(b) of the Constitution.

Reacting to the interpretation in respect of Section 3(5) of the Cr.PC it is the stand of the petitioners that Section 3(5) does not enable a District Magistrate in Mizoram to be appointed as Special Judge as contemplated u/s 3 of the Prevention of Corruption Act, 1988. Further stand in the reply is that in view of the various statutory notifications in place, the District Magistrates while conducting criminal trial in the State of Mizoram under the Administration of Justice Rules for Lushai Hills Autonomous District, 1953 (hereinafter referred to

as "the Rules of 1953") and the Rules for regulation of the procedure of the Officers Appointed to Administer Justice in Lushai Hills promulgated in 1937 (hereinafter referred to as "the Rules of 1937") are neither competent nor authorised to exercise all the powers of a Sessions Judge stipulated under Cr.PC. The respondent No. 5 having not been appointed and in fact having not exercised the powers of a Sessions Judge or an Additional Sessions Judge or Assistant Sessions Judge under the Cr.PC is not qualified for appointment as a Special Judge under the said Act of 1988.

10. I have heard Mr. N. Dutta, learned senior counsel leading the argument in both the writ petitions assisted by the learned counsel Mr. S.S. Dey. I have also heard Mr. P. Pathak, learned senior counsel and Advocate General, State of Mizoram and Mr. B.P. Katakey, learned senior counsel appearing on behalf of the High Court Registry. Mr. Dutta, learned senior counsel while reiterating the stand in the writ petition and the affidavit-in-reply extensively referred to the various provisions of the Constitution of India, Prevention of Corruption Act, 1988, Code of Criminal Procedure, 1973, Rules of 1953 and 1937 the decision of the Apex Court as reported in Shri Kumar Padma Prasad Vs. Union of India and others, and emphatically submitted that the very investment of the power of Sessions Judge to the respondent No. 5 and others as mentioned in the notification dated 6.2.1997 is illegal inasmuch as Section 32 of the Cr.PC prescribed only the mode of conferment of such power and that to only too eligible persons, and it does not by itself provide any source of power for such conferment of power. Referring to the notification dated 6.2.1996 issued by the Government of Mizoram by which some of the provisions of Cr.PC were applied to the State of Mizoram, Mr. Dutta submitted that even by the said notification the Sessions Court or Sessions Judge was not envisaged. Prior to that while enacting the Code of Criminal Procedure, 1973 and extending the same to the whole of India except the State of Jammu & Kashmir it was provided that the Code other than those relating to Chapters VIII, X and XI not applicable to the State of Nagaland and to the tribal areas, however, providing that the concerned State Government might, by notification, apply such provisions or any one of them with such supplemental, incidental or consequential modification as might be specified in the notification.

11. Mr. Dutta emphasised that the powers of Sessions Judge and District Magistrate are completely different. In this connection he exclusively referred to the provisions of the Cr.PC and the Administrative of Justice Rules, 1953. The District Magistrate having not been appointed by the High Court, it could not have issued the notification dated 6.2.1997 conferring powers of Sessions Judge in violation of Article 372 of the Constitution of India. According to Mr. Dutta this is fraud on the Constitution. He attacked the impugned notifications as unconstitutional on ground of being too general and omnibus. Referring to the notification dated 4.9.1997 transferring and posting the respondent No. 5 as Special Judge under the Prevention of Corruption Act, Mr. Dutta emphasised on the words "transfer and posting" and submitted that the notification is contrary to Rule 9 of the Rules of 1953 and unconstitutional. He submitted that Rule 9

could not have been amended in this manner by the High Court without there being an Act of either Parliament or State Legislature. Placing reliance on the aforesaid decision of Shri Kumar Padma Prasad (supra), Mr. Dutta submitted that the judgment in Lal Siamkunga (supra) has been rendered per incurrium.

12. In addition to the above argument, Mr. Dutta submitted that neither the respondents who have filed their affidavits nor the respondent No. 5 have disclosed anything regarding service career of the respondent No. 5. He submitted that strangely enough the respondent No. 5 against whom a writ of quo-warranto has been prayed for has not come forward to disclose his particulars justifying holding of the office of the Special Judge. Referring to a particular "Booklet" published in Mizo language, Mr. Dutta submitted that the apprehension of the petitioners is fully established inasmuch as the said Booklet allegedly contains every details of the criminal proceeding including the disclosure of Case Diary which according to Mr. Dutta has been so done at the behest of the political party which is behind the entire episode. It is in this context coupled with the fact that the respondent No. 5 is under the administrative control of the State Government and that prior to issuance of the impugned notification appointing the respondent No. 5 as the Special Judge, the jurisdiction was vested with the Sessions Judge at Silchar, Assam, it was submitted that leaving aside the question of legality or otherwise of the appointment of the respondent No. 5 as the Special Judge under the Act of 1988, the criminal trial in the instant case is liable to be transfer to other court of competent jurisdiction. Mr. Dutta made it known that although according to the prayer in the writ petition the petitioners have sought for transfer of the criminal trial to Guwahati, but they are agreeable to face the trial anywhere outside the State of Mizoram including the court at Silchar.

13. Mr. P. Pathak, learned Advocate General, State of Mizoram and Mr. B.P. Katakey, learned senior counsel appearing on behalf of the Registrar General, Gauhati High Court submitted that the issue raised is not longer res-integra in view of the above referred Division Bench judgment of this Court in Lal Siamkunga (supra). They submitted that when admittedly there is no separation of Judiciary, the situation has been taken care of by the Rules. Referring to Rules 14 and 14A of the Rules of 1937, they submitted that the Deputy Commissioner and all Magistrates are empowered to try criminal cases and even empowered to pass sentence of death. Referring to the provisions of para 5 of the Sixth Schedule of the Constitution of India, they submitted that the source of power allegedly being not available in the instant case towards conferment of powers of a Sessions Judge, much emphasised by the learned senior counsel for the petitioners, they submitted that such an argument is fallacious and* devoid of any merit. They submitted that it was in such a situation an amendment to the Code of Criminal Procedure, 1973 was felt necessary in no time and accordingly the amendment by way of incorporation of Sub-section 5 to Section 3 of the Code of Criminal Procedure, 1973 was brought in 1974. According to them the conferment of power of a Sessions Judge to even to a District Judge is like that

of conferment of powers of Sessions Judge to the District Magistrates in the State of Mizoram. Referring to the provisions of Terrorist and Disruptive Activities (Prevention) Act, 1987, it was submitted that the provisions of the Act having been applied to whole of India, it included the State of Mizoram also and thus there is no infirmity in transferring and posting the Judge of the TADA Court as Special Judge.

14. They submitted that the real test is not whether the respondent No. 5 is a Judicial Officer, but as to whether he is a Sessions Judge in the context and submitted that Shri Kumar Padma Prasad's case (supra) is clearly distinguishable. Emphasising on the uncontroversial position that the District Magistrate is even empowered to pass death sentence, the learned counsel questioned that in such a situation where is the impediment towards appointment of the respondent No. 5 as a Special Judge and that in the scheduled areas, exception has to be made, otherwise the incorporation of Sub-section 5 to Section 3 was redundant. They buttressed their argument by pointing out that a District Judge may be a Sessions Judge but a Sessions Judge may not be a District Judge. As regards the distribution of the Booklet etc., Mr. Pathak, learned Advocate General ridiculed the same and urged to ignore the same in absence of any pleading to that effect. He finally submitted that the law having been settled in the case Lal Siamkunga (supra), after hearing all the Advocate Generals of the North Eastern States, there is no question of re-opening the issue as has been raised by the petitioners.

15. Mr. B.P. Katakey in addition to the above arguments also emphasised that in the case of Shri Kumar Padma Prasad (supra) the interpretation was relating to "Judicial Officer" in the context of appointment of a High Court Judge and the Apex Court was not required to go to the issue now raised in the present proceeding. He further submitted in reference to Section 28 of the Cr.PC in respect of sentence, which a Sessions Judge, Additional Sessions Judge and the Assistant Sessions Judge are authorised to pass, that the same would have to be read with the Rules of 1937 and 1953. Referring to the provisions of Section 33 of the Cr.PC he submitted that even an officer holding an office under the Government can be invested with any power under the court by the High Court or the State Government. He further submitted that when a District Magistrate can exercise power u/s 438 of the Cr.PC, it will not be correct to say that to be a Sessions Judge one will have to be a District Judge. He finally submitted that a District Magistrate must be held to be a Sessions Judge for the purpose of Administration of Criminal Justice in the State where there is no separation of Judiciary as yet.

16. Amidst the above elaborate and detailed arguments, the question to be decided is whether the view expressed in the aforesaid Division Bench judgment in Lal Siamkunga (supra) can be said to be a judgment rendered per incuriam in view of the earlier decision of the Apex Court in Shri Kumar Padma Prasad case (supra) which was admittedly not placed before the Division Bench nor

considered by it. In the case of Lal Siamkunga (supra) the Division Bench of this Court held that although the Courts of Session have not been constituted in the State of Mizoram, construction of references to Courts of Sessions as references to the Courts of Deputy Commissioner should not be disturbed. Such a finding was arrived at after observing that it was a long standing legal position in the "Schedule Areas" that references to Courts of Session were construed as references to Courts of Deputy Commissioners/District Magistrates and such a long standing practice should not be disturbed. Paragraph 11 in which such a finding has been recorded is quoted below :

"11. It is a long standing legal position in the "Schedule Areas" that references to the Courts of Session, are construed as references to Courts of Deputy Commissioner/District Magistrate. In B. Lakshmipathi Naidu Vs. The Distt. Educational Officer and others, the Supreme Court held that long standing legal position of law should not be disturbed. Applying the principles laid down by the Supreme Court, we are of the view that, although Courts of Sessions have not been constituted, construction of references to Courts of Session as references to the Courts of Deputy Commissioner should not be disturbed. For the reasons stated, references to "Deputy Commissioner" or "District Magistrate", in the relevant rules, in the context of cases are triable by the Courts of Session, should be read as reference to "Sessions Judge". We hold that "Sessions Judge" and "Additional Sessions Judge" in Section 9 of the TADA Act must be deemed to include Deputy Commissioner for the purpose of TADA Act. The question is answered in the affirmative."

17. In the said decision the Division Bench further observed before parting with the case as a duty of the court to refer to the state of affairs relating to Civil and Criminal Justice in the Schedule areas pointing out that the Administration of Justice is mainly in the hands of Deputy Commissioner and his assistance who are Executive Officers which position does not alter even if these officers are described as Deputy Commissioner (Judicial). The Division Bench went on to add that whatever be the description, the said officers are essentially under the full control of the State Government. It further observed that appointments are made without reference to the High Court and that it is not even certain that all the officers are law Graduates or have experience in practice of law. The Division Bench made those observations as it felt that the quality of justice rendered to the seekers of justice in the areas as in the instant case is of inferior kind. It left to the concerned Government to decide whether the state of affairs should continue or whether by separating the Judiciary from the Executive and bringing the former under the control of the High Court, the position should be rectified.

18. Thus from the above observations of the Division Bench of this Court the much emphasised argument on behalf of the petitioners that the respondent No. 5 is essentially an Executive Officer under the control of the Government of Mizoram and that he is not a Judicial Officer as contemplated under the Prevention of Corruption Act, 1988 finds support. It is in this context the decision

of the Apex Court in *Shri Kumar Padma Prasad (supra)* has been pressed into service. This case as the Apex Court itself observed was the first of its kind in the post independent era in which the Apex Court was seized of a situation where it had to perform the painful duty of determining the eligibility of a person who had already been appointed as a Judge of High Court by the President of India and who was awaiting to enter upon his office. In that case the Apex Court was called upon to answer the question as to whether the person concerned was qualified to be appointed as Judge of the High Court. Alleging him to be not qualified for such appointment a writ petition under Article 226 of the Constitution of India was filed before this court in which an interim order was passed directing not to give effect to the warrant of appointment. The person concerned filed SLP against the order of the High Court, transfer petition seeking transfer of writ proceedings and also writ petition under Article 32 of the Constitution of India. The Apex Court withdrew the writ petition from the file of the High Court and transferred the same to its own court. Before the Apex Court the following contentions were raised for its consideration.

"1. Appointment of S as a Judge of the High Court was violative of Article 217(2) as admittedly he had not been an advocate of a High Court for at least ten years within the meaning of Sub-clause (b) of Clause (2) and his bio-data did not show that he ever held a "Judicial office" in the territory of India within the meaning of Sub-clause (a) of Clause (2).

2. By virtue of his appointment as Assistant to the Deputy Commissioner, Aizawl Distt. During 1979 pursuant to the notification issued by the Government of Mizoram in addition to his own duties as Under Secretary, Law and Judicial, S did not hold a judicial office as envisaged under Article 217(2)(a).

3. There had been no consultation amongst the constitutional authorities as required under Article 217(1)."

19. The Apex Court accepted the first two contentions and without expressing any opinion on the third point and allowing the writ petition in the High Court observed in paragraphs 22, 23 and 25 of the judgment as follows :

"22. It is in the above context that we have to interpret the meaning of expression "judicial office" under Article 217(2)(a) of the Constitution of India. The High Court Judges are appointed from two sources, members of the Bar and from amongst the persons who have held "judicial office" for not less than ten years. Even a subordinate judicial officer manning a court inferior to the District Judge can be appointed as a Judge of a High Court. The expression "judicial officer" in generic sense may include wide variety of offices which are connected with the administration of justice in one way or the other. Under the Criminal Procedure Code, 1973 powers on Judicial Magistrate can be conferred on any person who holds or has held any office under the Government. Officers holding various posts under the executive are often vested with the Magisterial powers to meet a particular situation. Did the framers of the Constitution have this type of

"offices" in mind when they provided a source of appointment to the high office of a Judge of High Court from amongst the holder of a "judicial office". The answer has to be in the negative. We are of the view that holder of "judicial officer" under Article 217(2)(a) means the person who exercises only judicial functions, determines causes inter-partes and renders decisions in a judicial capacity. He must belong to the judicial service which as a class is free from executive control and is disciplined to uphold the dignity, integrity and independence of judiciary."

20. The Apex Court went on to examine whether the person concerned was qualified for appointment as a Judge of the High Court on the basis of the offices held by him. He belonged to the "Mizoram Judicial Service". The Court noticed that the Mizoram Judicial Service Rules, 1986 came into force with effect from 17.11.1986 and the same were superseded by Mizoram Judicial Service Rules, 1989 which were framed under Article 309 read with Articles 233 and 234 of the Constitution of India in consultation with the Guahati High Court. Under the 1989 Rules various posts in different grades were created as indicated in Schedule-A and quoted in paragraph 26 of the judgment. After noticing the offices held by the person concerned the Apex Court held that he was not qualified for appointment as a Judge of a High Court and expressed its surprise as to how the Bio-data of the person concerned escaped its scrutiny of the authorities during the process of consultation under Article 217(1) of the Constitution of India.

21. Considering the delicacy and sensitivity of the matter and the stage at which the matter was brought before the court for judicial scrutiny, the Apex Court allowed placing of further materials on record by the person concerned to show that notwithstanding his Bio-data before the authorities he was qualified to be appointed as a Judge of the High Court. Accordingly additional affidavit was filed placing certain more documents, which were not placed earlier before the authorities. He placed reliance on the notification dated 23.6.1979 and contended that he was invested under Rule 9 of the Rules of 1937 with the powers analogous to the powers of a Judicial Magistrate of the First Class as defined in the Code of Criminal Procedure, 1973. The said notification as quoted in paragraph 29 of the judgment reads as follows :

"NOTIFICATION

Dated Aizawl, June 23, 1979.

No. CS/MZ/APPT/79 : Under Rules 8 and 15 of the Rules for the regulation of the procedure of officers appointed to administer justice in the Lushai Hills, published vide Notification No. 2530 (a) A.P. dated March 25, 1937 the Shri Lal Thanhawla. Governor (Administrator) of Mizoram is pleased to appoint the following Officers as Assistant to the Deputy Commissioner, Aizawl District and further to invest under Rule 9 of the aforesaid rules with the powers analogous to the powers of a Judicial Magistrate of the First Class defined in the Code of Criminal Procedure, 1973 (Act 2 of 1974) in addition to their duties.

Name of officers Designation 1. 2.

(Further in exercise of the powers conferred by Sub-section (1) of Section 20 of Code of Criminal Procedure, 1973 (Act 2 of 1974) read with the Notification of the Government of India, Ministry of Home Affairs No. 11 11/2/74-UTL (iii) S.O. 185(E) dated the March 20, 1974 the LT. Governor (Administrator) is pleased to appoint the above-mentioned officers as Executive Magistrates also in Aizawl District.

22. The Apex Court exclusively quoted the provisions of Rules 1, 8, 9, 10, 14, 15 and 19 of the Rules of 1937 in paragraph 30 of the judgment of which references have also been made by the learned counsel for the parties in the instant case. It recorded the extensive argument advanced by the learned counsel for the person concerned that the Deputy Commissioner and his Assistants under the Rules of 1937 were exclusively manning the Administration of Justice both on Civil and Criminal side and that no other courts were functioning. It also recorded the submissions that apart from administering Criminal and Civil Justice, the total administration of the district known as Lushai Hills was vested in the Governor of Assam, the Deputy Commissioner of the Lushai Hills and his assistants. It recorded that the Deputy Commissioner under the Rules of 1937 was competent to pass sentence of death etc. and that the office of the Assistants to which the person concerned was appointed was a judicial office under the Rules of 1937 and thus he fulfilled the qualification under Article 217(2)(a) read with (a) to the Explanation.

23. Disagreeing with the aforesaid contentions raised on behalf of the person concerned the Apex Court observed that the very fact that officers from different departments were appointed as Assistants in addition to their duties was significant and clearly had shown that there was no separate office with a designation of Assistant to the Deputy Commissioner on which those appointments were made. It observed that keeping in view the exigency of administration different officers working with the Government of Mizoram were invested with the power of Judicial and Executive Magistrate by appointing them Assistants in addition to their own duties and held that "it would be travesty of justice if we hold that an Architect working in the PWD department by virtue of he is being vested with the powers of an Assistant in addition to his own duties comes to hold a "Judicial Office" in terms of Article 217(2)(a) of the Constitution of India. There was no separation of Judiciary from the Executive under the 1937 Rules and the total administration of the area including Administration of Justice was being done by the officers who were under the control of the Executive. There was no Judicial Service as envisaged by Article 236(b) of the Constitution of India and as such as Assistant to the Deputy Commissioner could not be a judicial officer in terms of Article 217(2)(a) of the Constitution of India."

24. The Apex Court interpreted the word "office" and observed that it has various meanings and which is the appropriate meaning to be ascribed to the word in the context it appears in the Constitution needs to be examined. It held that the

framers of the Constitution did not and could not have meant by a "Judicial Office" which did not exist independently and the duties or part of the duties of which could be conferred on any person whether trained or not in the administration of Justice. It held that the word "Judicial Office" under Article 217(2)(a) means a substantive office with a substantive position which has an existence independent from its holder. Accordingly the Apex Court accepted the second contention as quoted above. It further considered the contention raised on behalf of the person concerned that there being no separation of Judiciary in Mizoram and justice, Civil and Criminal being solely administered by the Executive officers under the Rules of 1937, they are Judicial Officers within the ambit of Article 217(2)(a) of the Constitution and disagreed with the same. It observed as follows :

"Before independence the district judges were appointed by the Governor from three sources, namely, (1) the Indian Civil Service, (2) the Provincial Judicial Service and (3) the Bar. After independence recruitment to the Indian Civil Service was discontinued and the officers of the Indian Administrative Service which substituted the Indian Civil Service were not to be given judicial posts. The District Judges have been recruited only from two sources (1) bar and (2) judicial service. There has been no case of a member of the executive having been promoted as a District Judge. The independence of judiciary is part of the basic structure of the Constitution. The Directive Principles give a mandate that the State shall take steps to separate the judiciary from the executive which means that there shall be a separate judicial service free from the executive control. The constitution scheme, therefore, only permit members of the judicial service as constituted in terms of Article 236(b) of the Constitution to be considered for the post of District Judge and that of " the High Court Judge. It would be useful to refer to Article 237 of the Constitution of India.

237. Application of the provisions of this Chapter to certain class or classes of magistrates. - The Governor may by public notification direct that the foregoing provisions of this Chapter and any rules made thereunder shall with effect from such date as may be fixed by him in that behalf apply in relation to any class or classes of magistrates in the State as they apply in relation to persons appointed to the judicial service of the State subject to such exceptions and modification as may be specified in the notification."

25. The Apex Court placed reliance on its earlier decision as reported in AIR 1966 SC 1987 (Chandra Mohan v. State of U.P.) and observed that the Magistrates who were not appointed to the Judicial Service of the State can be brought into the judicial service by way of a notification under Article 237 of the Constitution and that till the time there is separation of judiciary or a notification under Article 237 is issued, there is no question of considering the Executive Officers or even Magistrates for appointment to the post of District Judge or a High Court Judge even though the Executive Officers or Magistrates concerned have the adornment of a judicial office. The court noticed the scheme under the Constitution for

establishing an independent judiciary. Referring to the provisions of Articles 233, 234, 235 and 236(b), the court observed that the Judicial Service in a State is distinct and separate from the other services under the executive and that the members of the Judicial Service perform exclusively judicial functions and is responsible for the administration of Justice in the State. In paragraph 20 of the judgment, the court after quoting the observations and findings of its earlier decision in Chandra Mohans case (supra) observed that the appointment of District Judges under Article 233(2) can only be from the Judicial Service as defined under Article 236(b) of the Constitution. The observations and findings of the Apex Court in Chandra Mohan's case are reproduced below for ready reference.

"The Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States; it constitutes a High Court for each State, prescribes the institutional conditions of service of the Judges thereof, confers extensive jurisdiction on it to issue writs to keep all tribunals, including in appropriate cases the Governments, within bounds and gives to it the power of superintendent over all courts and tribunals in the territory over which it has jurisdiction. But the makers of the Constitution also realised that it is the Subordinate Judiciary in India who are brought most closely into contact with the people, and it is no less important, perhaps indeed even more important, that their independence should be pieced beyond question than in the case of the superior Judges. Presumably to secure the independence of the judiciary from the executive, the Constitution introduced a group of articles in Chapter VI of Part VI under the heading "Subordinate Courts". But at the time of Constitution was made, in most of the States the magistracy was under the direct control of the executive. Indeed it is common knowledge that the pre-independent India there was a strong agitation that the judiciary should be separated from the executive and that the agitation was based upon the assumption that unless they were separated the independence of the judiciary at the lower levels would be a mockery. So Article 50 of the Directive Principles of Police states that the State shall take steps to separate the judiciary from the executive in the public services of the State. Simply stated, it means that there shall be a separate judicial service free from the executive control.

[T]he real conflict rests on the question whether the Governor can appoint as district judges persons from services other than the judicial service, that is to say, can he appoint a person who is in the police, excise, revenue or such other service as a district Judge? The acceptance of this position would take us back to the pre-independence days and that too to the conditions prevailing under the Princely States. In the Princely States one used to come across appointments to the judicial service from police and other departments. This would also cut across the well-knit scheme of the Constitution and the principle underlying it, namely, the judiciary shall be an independent service. Doubtless, if Article 233(1) is nothing more than a declaration of the general power of the Governor in the matter of appointment of district judges. It does not lay down the qualifications

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

26. The Prevention of Corruption Act, 1988 extends to the whole of India except the State of Jammu & Kashmir. Section 3 of the Act speaks in unequivocal terms that a person shall not be qualified for appointment as a Special Judge under the Act unless he is or has been a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure, 1973. Section 5 of the Act prescribes the procedure and powers of the Special Judge and he is to follow the warrant procedure. Section 1(2) of the Cr.PC provides that the Code extends to the whole of India except the State of Jammu & Kashmir. As per the proviso to Section 1(2) of the Cr.PC, the provisions of the code other than those relating to Chapters VIII, X and XI thereof shall not apply to the State of Nagaland and to the Tribal Areas which naturally included the then Mizoram. As per provisions of Section 1(2) which empowers the State Government to apply such provisions or any of them to the whole or part of the tribal areas and the

State of Nagaland by issuing notification to that effect, the Government of Mizoram issued notification dated 6.2.1996 applying to the State of Mizoram the provisions of Sections 6-7, 10-15, 24, 25, Chapters III-IV, Sections 154-164, 169-173, 175-176, 199, 237, Chapters XXXI, XXIV, Sections 376, 436 and 438-450 of the Code with immediate effect. Thus as per the said notification and in reference to the provisions mentioned therein, the Session Court or Sessions Judge was not envisaged.

27. Rule 8 under the head "Criminal Justice" under the Rules of 1937 provides that the Deputy Commissioner and his Assistants shall ordinarily administer Criminal Justice. As per provisions of Rule 9, the Deputy Commissioner shall be competent to pass sentence of death, transportation or imprisonment upto the maximum amount provided for the offence, of whipping, and of fine upto any amount : provided that all sentences of death, transportation or imprisonment of 7 years and upwards shall be subject to the confirmation by the Assam High Court. On the other hand Section 28 of the Cr.PC empowers the Sessions Judge or Additional Sessions Judge to pass any sentence authorised by law with the exception that in the case of any sentence of death it shall be subject to confirmation by the High Court. An Assistant Sessions Judge is empowered to impose any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding 10 years. Section 29(1) of the Code empowers the Chief Judicial Magistrate to pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding 7 years. It is in this context, the argument on behalf of the petitioners was that a District Magistrate and for that matter the Deputy Commissioner cannot be equated even with that of Assistant Sessions Judge not to speak of a Sessions Judge. Further Rule 10 of the Rules of 1937 provides for appeal to the Deputy Commissioner against any order passed by any of his Assistants. An appeal shall lie to the High Court from any sentence passed by the Deputy Commissioner. However, Section 375 of the Cr.PC speaks of an exception providing that there shall be no appeal, where an accused person has pleaded guilty and has been convicted on such plea. Thus admittedly in reference to these provisions of the Cr.P.C and the Rules of 1937, there is no manner of doubt that the Deputy Commissioner and his Assistants cannot be equated with that of Sessions Judge. The Sessions Judge and the Additional Sessions Judge and even the Assistant Sessions Judge enjoy more and different power than that of a Deputy Commissioner. Even Rule 11 of the aforesaid Rules of 1937 provides that the spirit of the Cr.PC shall only apply so far as the same is applicable to the circumstances and consistent with the said Rules. This Court had the occasion to deal with a case in which the abuse of "the discretion" in the name of following the Code in spirit and how the same was made use of for disregarding the provisions and dishonouring the essence of the spirit. In the said case pertaining to Nagaland it was emphasised that it was high time for the State to consider for full application of the Cr.PC in letters which would be for the welfare of the backward tribes of the State, The case is reported in (1986) 2 GLR 339

(Nzanthong and Ors. v. the State of Nagaland).

28. Article 372 of the Constitution of India provides for continuance in force of existing Rules and their adoption. Notwithstanding the repeal by the Constitution for the enactments referred to Article 395, and the law in force in the territory of India immediately before the commandants of the Constitution remains in force, until altered or repealed or amended by competent legislator or other competent authority. It is in this context, it was argued on behalf of the petitioners that the impugned notification, dated 6.2.1997 conferring the powers of Sessions Judge to the officers mentioned in the notification is violative of Article 372 inasmuch as by issuing the said notification, the High Court has virtually amended the Rules of 1937. Admittedly the District Magistrates are not appointed by the High Court. Section 9 of the Cr.PC dealing with the court of Sessions empowers the High Court to make arrangements of the disposal of any urgent application which is or may be, made or pending before such court of Sessions, which is vacant by an Additional or Assistant Session, Judge or by a Chief Judicial Magistrate in the Sessions Division in absence of Additional or Assistant Sessions Judge. Thus no provision has been made which empowers the High Court to make such arrangements for disposal of any such application by an officer other than the Judicial Officers mentioned in Section 9(5) of the Cr.PC.

29. Section 32 of the Cr.PC prescribes only the mode of conferring powers and by itself does not provide for any independent source of power. It is in this context, referring to the impugned notification dated 6.2.1997 it was argued that conferment of power of Sessions Judge without creating any Sessions Division and making any reference to Section 9(5) of Cr.P.C was illegal. The notification dated 6.2.1997 conferring powers of Sessions Judge to the four officers named therein will definitely have a bearing to the provisions of Rule 9 of the 1937 Rules which empowers the District Magistrates to pass the sentences as specified therein. A sentence of imprisonment of seven years and upwards requires the confirmation of the High Court which is not the case with the power of sentencing in respect of a Sessions Judge, Additional Sessions Judge, Assistant Sessions Judge or even a Chief Judicial Magistrate. In the case of a Chief Judicial Magistrate, he is authorised to pass sentence for a term upto seven years, which is not the case with the District Magistrate in whose case even a sentence of imprisonment of seven years shall require the confirmation of the High Court. The moot question is whether the High Court could have altered the position as envisaged under Rules 9 of the 1937 Rules, which virtually amounts to an amendment of the said Rule, which could only be done either by the Parliament or by the State Legislature.

30. The practical reality is that the High Court does not appoint any Sessions Judge in Mizoram. Admittedly there is no Sessions Judge or Additional Sessions Judge or Assistant Sessions Judge. Deputy Commissioners and his Assistants exercise the criminal justice system in Mizoram. It has already been noticed that all the powers exercised by them are not exercised by the Deputy Commissioner

and his Assistants. Appeal lies to the Deputy Commissioner against any order passed by his Assistants. As per provisions of Rule 10 of the 1937 Rules an Appeal lies to the High Court from any sentence passed by the Deputy Commissioner. However, as per provisions of Section 376(b) of the Cr.PC there is an exception to the same in respect of a Court of Session or a Metropolitan Magistrate. They also do not belong to "Judicial Service" as per Article 236(b) of the Constitution of India. They are only Executive Officers under the Administrative control of the Executives and do not come within the purview of Articles 233 to 236 which inter alia provides for appointment of District Judge, recruitment of persons other than District Judges to the judicial service, control over subordinate Courts and the interpretation relating to the expression "District Judge" and "Judicial Service".

31. It is in the above context, it was argued on behalf of the petitioners that the judgment of the Division Bench in *Lal Siamkunga* (supra) was rendered per incurrium in reference to *Shri Kumar Padma Prasad's* case (supra). We may also refer to Rules 14 and 14A of the 1937 Rules as were relied upon by Mr. P. Pathak, learned Advocate General, Mizoram. As per the provisions of the said Rules the Deputy Commissioner and all Magistrates are to keep such registers of criminal cases and submit such returns as the High Court shall from time to time prescribe. Rule 14A empowers the Deputy Commissioner to pass sentence of death subject to confirmation of the High Court. Mr. Pathak also referred to para 5 of the 6th Schedule of the Constitution to bring home his point of argument that in absence of any Sessions Court and Sessions Division, the Governor is empowered to confer power on the District Council or the Regional Council under the provisions of CPC and the Code of Criminal Procedure. It is in this context it was argued that an exception will have to be made in respect of the Schedule Areas and this is precisely the reason as to why immediately after promulgation of Cr.PC 1973, the amendment was brought in 1974 in respect of Arunachal Pradesh and Mizoram.

32. Article 233(2) of the Constitution prescribes the qualification for appointment of District Judge which expression includes Judge of a City Civil Court, Additional District Judge, Joint District Judge, Assistant District Judge, Chief Judge of a small cause court, Chief Presidency Magistrate, Additional Chief Presidency Magistrate, Sessions Judge, Additional Sessions Judge and Assistant Sessions Judge. It does not include the officers as contemplated under the 1937 Rules. If the amendment to Section 3 of the Cr.PC by incorporating Sub-section 5 was for the purpose of equating District Magistrate with that of the Court of Session or Sessions Judge as was argued by Mr. Pathak, learned Advocate General, Mizoram and Mr. Katakey, learned counsel appearing for the High Court Registry, then the question arises what was the necessity to issue the impugned notification dated 6.2.1997 purportedly in exercise of power under Cr.PC investing the officers named in the notification with the powers of Sessions Judge. Again in terms of Section 9(2) of the Cr.PC, every court of Sessions shall be presided over by a Judge, to be appointed by the High Court. Under Sub-section 3 of Section 9 of

Cr.PC, the High Court may also appoint Additional Sessions Judge and Assistant Sessions Judges to exercise jurisdiction in a Court of Session. Section 3(5) of Cr.PC does not automatically make a District Magistrate or a Deputy Commissioner a Sessions Judge. It is in this context the amendment brought by Section 3(5) of Cr.PC will have to be understood in reference to Section 12 of the Code.

33. If the argument made by the learned counsel for the respondents is to be accepted in relation to the interpretation given to Section 3(5) of the Code then in that case the arguments advanced on behalf of the petitioners placing reliance on Shri Kumar Padma Prasad's case (supra) will have to be ignored. Likewise, if one is to read a District Magistrate as Sessions Judge as was argued by the learned counsel appearing for the respondents in reference to Section 3(5) Cr.PC, then also another question arises apart from the question as to what was the necessity to issue the impugned notification dated 6.2.1997 that how the situation is reconciled in reference to the power of sentence as envisaged u/s 28 of the Cr.PC for a Sessions Judge, Additional Sessions Judge or an Assistant Sessions Judge vis-a-vis the power of a District Magistrate as envisaged under Rule 9 of the 1937 Rules. In the case of Lal Siamkunga (supra), the Division Bench of this Court after holding that it has been a long standing position in the "Schedule Areas" that references to Court of Sessions are construed as references to Courts of Deputy Commissioner/District Magistrate and that such a long standing legal position of law should not be disturbed held that the "Sessions Judge" and "Additional Sessions Judge" u/s 9 of the TADA Act must be deemed to include Deputy Commissioner for the purpose of TADA Act. Although the judgment in Shri Kumar Padma Prasad's case was available by the time the judgment in Lal Siamukunga was delivered, the said decision was not placed before the Division Bench and thus obviously was not referred to. It has already been noticed that in Shri Kumar Padma Prasad's case the Apex Court made elaborate discussions referring to the Constitutional provisions and the provisions contained in Cr.PC relating to the term "Judicial Office". It also referred to the Rules of 1937 and 1953.

34. u/s 9 of the TADA Act, 1987, the Central Government or a State Government may, by notification constitute one or more Designated Courts. Section 9(4) of the Act provides that a Designated Court shall be presided over by a Judge to be appointed by the Central Government or the State Government, as the case may be with the concurrence of the Chief Justice of the High Court. Same is the case in respect of appointment of Additional Judges. Section 9(6) of the Act provides that a person shall not be qualified for appointment as a Judge or an Additional Judge of a Designated Court unless he is, immediately before such appointment, a Sessions Judge or an Additional Sessions Judge in any State. Thus the provisions of TADA Act do not contemplate a situation or position like that a Section 3(2) of the Prevention of Corruption Act, 1988 under which a person shall not be qualified for appointment as a Special Judge unless he is or has been a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge

under the Code of Criminal Procedure, 1973. Under the TADA Act, Section 9 does not make any reference to the Code of Criminal Procedure. The impugned notification dated 6.2.1997, 19.8.1997 and 4.9.1997 appeared to have been issued on the basis of the judgment in Lal Siamkunga's case (supra). However, the records produced by the learned counsel appearing for the High Court Registry do not reflect any reference to the decision of the Apex Court in Shri Kumar Padma Prasad's case (supra).

35. As regards the second aspect of the matter as contended by the learned senior counsel appearing for the petitioners that they would not get proper justice if the trial is allowed to be carried out by the respondent No. 5, same will have to be decided on the basis of the answer to the issue relating to competence and jurisdiction of the said respondent to act as the Special Judge. If the answer is in the affirmative upholding the impugned notifications, the second aspect of the matter will have to be gone into, otherwise not. The Apex Court in the case of R. Balakrishna Pillai Vs. State of Kerala, on the plea of transfer of the appeals against conviction under the Prevention of Corruption Act from the High Court of Kerala to the High Court of Karnataka on ground that the appellant would not get justice in the criminal appeal if decided by the High Court of Kerala was rejected by the Apex Court inter alia on the ground of raising the issue of alleged adverse publicity in the press after a lapse of 4 years from the date of filing of the appeal in the High Court. Same is not the case here. The petitioners have approached this Court at the earliest opportunity. Another important aspect of the matter in the said case was that the Apex Court while rejecting the prayer for transfer of the appeal held that in this country there is complete separation of the judiciary from the executive and judges are not influenced in any manner either by propaganda or adverse publicity. It was in that context the Apex Court held that the cases are decided on the basis of the evidence available on record and the law applicable and that granting of application for transfer would result in casting unjustified aspersion on the Court having jurisdiction to decide the appeal on the assumption that its judicial verdict is consciously or subconsciously affected by the popular frenzy, official wrath or adverse publicity, which is not the position qua the judicial administration in this country."

36. In the above case, the Apex Court did not virtualise that there are some parts of the country in which as in the instant case, separation of judiciary is still a far cry in spite of number of judicial pronouncement emphasising the need for separation of judiciary. Admittedly, the Special Judge appointed by the impugned notification which was preceded by conferment of power of Sessions Judge is not holder of a "Judicial Office" about which much have been emphasised in Shri Kumar Padma Prasad's case (supra). The apprehension of the petitioners that they would not get a fair trial cannot be brushed aside. Such an apprehension was rejected by the Apex Court in the aforementioned case of R. Balakrishna (supra) primarily on ground of there being separation of judiciary in the country and that such transfer would result in casting unjustified aspersions on the Court towards judicial administration in this country. Does this position reflect in the

case at hand ? Can it be said that transfer of the trial from the respondent No. 5 would cast aspersions on the judicial system as prevalent in the State of Mizoram ? Can the respondent No. 5 who is admittedly an Executive Officer of the State, though vested with the power of administration of criminal justice can be equated with the kind of the position as visualised and projected in the aforesaid decision of the Apex Court i.e. R. Balakrishna (supra) ? It is upon answer to these questions, the second aspect of the matter under which the petitioners have expressed their apprehension praying for transfer of the trial from Mizoram and for that matter from the respondent No. 5 to elsewhere will have to be decided. However, as has been said above, such a course of action will have to be adopted only upon answer to the first and foremost issue raised in these writ petitions. Even otherwise also perhaps it will not be prudent on the part of the respondent No. 5 to proceed with the trial, once the petitioners have sought for a writ of quarranto against him, whatever may be the result in the writ proceedings.

37. The Apex Court in the case K. Anbazhagan Vs. The Superintendent of Police and Others Etc., while allowing transfer of criminal case from the Court of Additional Sessions Judge, Chennai in the State of Tamil Nadu to the State of Karnataka observed as follows :

"30. Free and fair trial is sine qua non of Article 21 of the Constitution. It is trite law that justice should not only be done but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias judicial fairness and the criminal justice system and woe would be the rule of law. It is important to note that in such a case the question is not whether the petitioner is actually biased by the question is whether the circumstances are such that there is a reasonable apprehension in the mind of the petitioner. In the present case, the circumstances as recited above are such of to create reasonable apprehension in the minds of the public at large in general and the petitioner in particular that there is every likelihood of failure of justice."

38. Sitting in writ jurisdiction a Single Judge is to decide all applications under Article 226 of the Constitution of India other than the categories of applications for which exception have been made under Rule 2 of the Rules as contained in Chapter V A of the Gauhati High Court Rules. Rule 2(d) of the said Rules provides for referring any application to the Hon'ble Chief Justice for placing it before the Division Bench having regard to the importance or complexity of the case. In the instant case, this Court has been referred to the aforesaid decisions of the Division Bench of this court in Lal Siamkunga (supra) as well as the decision of the Apex Court in Shri Kumar Padma Prasad (supra) which has also dealt with the issues now raised in these writ proceedings. Admittedly, this decision of the Apex Court was not referred to in the Division Bench judgment of this Court. Complex and important issues have been raised in both the writ petitions and this court is of the considered opinion that having regard to the issues raised and the aforesaid two decisions, it will be in fitness of the things to refer the matter

to the Hon''ble Chief Justice for his Lordships decision to place the matter before a Division Bench having regard to the importance and the complexity of the matter.

39. The matter stands referred to the Hon''ble Chief Justice for his Lordships consideration to place the matter before a Division Bench. The decision relating to the second aspect of the matter automatically stands deferred.