

State of Assam and Another

Vs

Kuseswar Saikia and Others

Civil Appeal No. 358 (N.C.E.) of 1969

(CJI M. Hidayatullah, J. M. Shelat, A. N. Grover, A. N. Ray, C. A. Vaidialingam JJ)

17.10.1969

JUDGMENT

HIDAYATULLAH, C.J. -

1. This is an appeal by certificate under Article 132 of the Constitution against the judgment and order of the High Court of Assam, February 5, 1969. It was filed by the State of Assam and the Legal Secretary to the Government of Assam and challenges a writ of quo warrant issued against Upendra Nath Rajkhowa, District and Sessions Judge, Darrang at Tazpur declaring that he was not entitled to hold that office. It was issued at the instance of Respondents 1 to 3 in this appeal. These respondents on conviction by Upendra Nath Rajkhowa in a sessions trial, challenged their conviction inter alia on the ground that Shri Rajkhowa was not entitled to hold the post of District and Sessions Judge, Darrang. The High Court held that the 'promotion' of Rajkhowa by the Governor as Additional District Judge by notification No. LJJ 74/66/65 dated 19-6-67 purporting to act under Article 233 was void because he could only be promoted by the High Court acting under Article 235. Consequently, his further appointment as District Judge by the Governor by notification No. LJJ 94/67/14 dated 28/7/1967 was also declared by the High Court to be void. The High Court, however, held that Rajkhowa's simultaneous 'promotion' as Additional Sessions Judge was valid as that post was not included in the Judicial service of the State and the Governor was competent to make the appointment. The High Court also held that his further appointment as Sessions Judge was also valid. The High Court, therefore, did not disturb the conviction and also did not pronounce any opinion on whether the judgment given as District Judge by Rajkhowa were void since that question did not arise on a petition for a writ of quo warranto.

2. The Assam Judicial Service was constituted by a notification of the Government of Assam issued on August 25, 1952. The Senior Branch of the service was known as State Judicial Service (Senior) and it consisted of the following posts :

Senior Grade I

#1. Registrar.2. Legal Remembrancer.3. District Judges.##

Senior Grade II

Additional District Judges.

On April 9, 1954, the State Judicial Service (Junior) was created. Separate rules governed the junior service. The following posts were included :

#Junior Grade II. Subordinate Judges.2. Deputy Registrar.Junior Grade III.
Munsiffs.2. Assistant Registrar.##

3. Rajkhowa was originally a Munsiff in Grade II. The Chief Justice of the High Court appointed him as Deputy Registrar and thus he was promoted to Grade I of the Junior Service. On June 19, 1967 the following notification was issued :

"No. LJJ 74/66/65. The services of Sri U. N. Rajkhowa, Deputy Registrar, High Court of Assam and Nagaland being replaced at the disposal of the Government. The Governor of Assam in consultation with the High Court of Assam and Nagaland, and in exercise of powers conferred by Article 233 of the Constitution read with Rule 5(ii) of the Assam Judicial Service (Senior) Rules, 1952 is pleased to appoint Sri Upendra Nath Rajkhowa to officiate as Additional District and Sessions Judge, Lower Assam Districts with Head Quarters at Nowgong with effect from the date he takes over as such vice Sri M. C. Mahajan.

(Sd.) B. SARMA, Secy. to the Government, Law Department"

It is this 'appointment' under Article 233 which is considered by the High Court to be void. According to the High Court this was a case of 'promotion' of a person belonging to the judicial service of the State and the High Court was the authority to make the promotion under Article 235. In this appeal the view of the High Court is challenged.

4. Chapter VI of Part VI of the Constitution deals with Subordinate Courts. The history of this Chapter and why judicial services came to be provided for separate from other services has been discussed in *The State of West Bengal v. Nripendra Nath Bagchi*. This service was provided for separately to make the office of a District Judge completely free of executive control. The Chapter contains six articles (233 to 237). We are not concerned with Article 237 in the present case. Article 235 vests in the High Court the control over District Courts and Courts subordinate thereto, including the posting and promotion and grant of leave to persons belonging to the judicial service of a State and holding any post inferior to the post of District Judge. By reason of the definitions given in Article 236, the expression 'Judicial service' means a service consisting exclusively of persons intended to fill the post of District Judge and other Civil Judicial posts inferior to the District Judge and the expression "District Judge" includes among other an additional District Judge and an Additional Sessions Judge. The promotion of persons belonging to the judicial service but holding post inferior to a District Judge vests in the High Court. As the expression District Judge includes an additional District Judge and an additional Sessions Judge, they rank above those persons whose promotion is vested in the High Court under Article 235. Therefore, the promotion of persons to be additional District Judges or additional Sessions Judges is not vested in the High Court. That is the function of the Governor under Article 233. This follows from the language of the article itself :

"(a) Appointments of persons to be, and the posting and promotion of, District Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

x x x x x"##

The language seems to have given trouble to the High Court. The High Court holds :

(1) 'appointment to be' a District Judge is to be made by the Governor in consultation with the High Court vide Article 233; and

(2) 'promotion' of a District Judge and not promotion 'to be a District Judge' is also to be made by the Governor in consultation with the High Court vide Article 233.

The High Court gives the example of Selection grade posts in the cadre of District Judges which according to it is a case of promotion of a District Judge.

5. The reading of the article by the High Court is, with respect, contrary to the grammar and punctuation of the article. The learned Chief Justice seems to think that the expression 'promotion of' governs 'District Judges' ignoring the common that follows the word 'of'. The article, if suitable expanded, reads as under :

"Appointments of person to be, and the posting and promotion of (persons to be), District Judge etc."

6. It means that appointment as well as promotion of persons to be District Judges is a matter for the Governor in consultation with the High Court and the expression 'District Judge' includes an additional District Judge and an additional Sessions Judge' includes an additional District Judge and an additional Sessions Judge. It must be remembered that District Judges may be directly appointed or may be promoted from the subordinate ranks of the judiciary. The article is intended to take care of both. It concerns initial appointment and initial promotion of persons to be either District Judges or any of the categories included in it. Further, promotion of District Judges is a matter of control of the High Court. What is said of District Judges here applies equally to additional District Judges and additional Sessions Judges. Therefore when the Governor appointed Rajkhowa an Additional District Judge, it could either be an 'appointment' or a promotion under Article 233. If it was an appointment it was clearly a matter under Article 233. If the notification be treated as 'promotion' of Rajkhowa from the junior service to the senior service it was a 'promotion' of a person to be a District Judge which expression, as shown above, includes an Additional District Judge. In our opinion, it was the latter. Thus, there is no doubt that the appointment of Rajkhowa as Additional District Judge by the Governor was a promotion and was made under Article 233. It could not be made under Article 235 which deals with posts subordinate to a District Judge including an Additional District Judge and an Additional Sessions Judge. The High Court was in error in holding that the appointment of Rajkhowa to the position of an Additional District Judge was invalid because the order was made by the Governor instead of the High Court. The appointment or promotion was perfectly valid and according to the Constitution.

7. This brings us to the next point in the case which arises as a side issue involving the Legal Secretary, who is also an appellant here. The Civil Courts Act was amended by the Assam Legislature by Act XII of 1967 which came into force on 16th August, 1967. The designation of Subordinate Judge was altered to Assistant District Judge. On August 17, 1967 new rules for the Assam Judicial Services were brought into force. The Judicial Services was reconstituted as follows :

Grade I

(1) District and Sessions Judge. (2) Registrar. (3) Presiding Officer, Industrial Tribunal. (4) Presiding Officer, Labour Court.

Grade II

(1) Additional District Magistrate. (2) Assistant District Judge (3) Deputy Registrar.

Grade III

(1) Munsiff. (2) Judicial Magistrate. (3) Sub-Divisional Magistrate (Judicial). (4) Assistant Registrar.

The High Court was of opinion that this was deliberately done to grab at the power of promoting Subordinate Judges by taking advantage of the definition of District Judge which includes an Assistant District Judge. By this device, which the High Court described as 'a fraud upon the Constitution' the power of promotion vested in the High Court in respect to persons belonging to the Judicial Service of a State and holding posts inferior to the post of the District Judge, the jurisdiction of the High Court under Article 235 was taken away. Formerly the Subordinate service was composed of two grades and promotion between the two grades was made by the High Court. Under the new rules there is only one Grade (i.e., Grade III) in which Article 235 can operate if at all. Since all the posts there are equal and carry equal pay there is no scope for promotion at all. The High Court is thus right that there is no scope for the exercise of the power of the High Court to make promotions in the case of persons below the rank of District Judges (which term includes in Assistant District Judge). The High Court was thus far right - but the High Court is not right in thinking that it can ignore the hierarchy of courts in Assam as established by law and treat the change as of no consequence. The remedy is not to go against the Civil Courts Act as amended, but to have the amendment rescinded. We are of the view that the change is likely to lead to an impairment of the independence of the judiciary at the lowest levels whose promotion which was vested by the Constitution in the High Court advisedly, will no longer be entirely in the hands of the High Court. The remedy for it is by amendment of the law to restore the former position. We may say that we do not approve of the change of mere name without any additional benefits.

8. The High Court was unnecessarily hard upon the legal Secretary. It is proved that this amendment was first thorough of several years ago when there was some other Legal Secretary. It is also established that the amendment was intended to bring in the nomenclature existing in some other States without realising what effect it would have upon the operation of Article 235 in the State. The remarks of the Chief Justice against the Legal Secretary were unmerited.

9. For these reasons we allow the appeal and set aside the writ of quo warranto issued by the High Court, but in the circumstances of the case we make no order about costs.

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