

State of Assam and Another

Vs

S. N. Sen and Another

Civil Appeal No. 1081 of 1967

(CJI S.M. Sikri, J.M. Shelat, G.K. Mitter, I.D. Dua, S.C. Roy JJ)

03.11.1971

JUDGMENT

ROY, J. -

1. This is an appeal by special leave against the judgment and order, dated September 12, 1966, in Civil Rule No. 381 of 1965 of the High Court of Assam and Nagaland. By this judgment a Division Bench of the High Court allowed the petition under Article 226 of the Constitution filed by the respondent S. N. Sen. The facts shortly are as follows :

2. Respondent No. 1, S. N. Sen, was initially appointed as an Extra Assistant Commissioner by the Governor of Assam on December 21, 1950. Thereafter he opted for Judicial Service and was appointed Munsiff by the Governor of Assam with effect from January 1, 1955. He was confirmed in the post of Munsiff in Assam Judicial Service (Junior) Grade II with effect from December 8, 1956.

3. On or about December 15, 1961, respondent No. 1 was promoted to act as the Additional Sub-Judge, Cachar, and he took charge on December 22, 1961. The High Court of Assam and Nagaland confirmed the appointment of respondent No. 1 in the Judicial Service (Junior) Grade I with effect from March 1, 1964, against the post of Sub-Judge No. 2, Gauhati. This post of Sub-Judge No. 2 Gauhati, was temporary, but had been made permanent on December 31, 1963. This confirmation was published in the Assam Gazette, dated May 1, 1964.

4. The Accountant General of Assam and Nagaland took objection to this order of confirmation. It was alleged that such confirmation was in violation of Rule 5 (iv) of the Assam Judicial Service (Junior) Rules, 1954. It was alleged that the confirmation could only be made by the Governor, and not by the High Court.

5. It appears that some correspondence went on between the High Court and the Accountant General. By letter, dated December 21, 1964, the Registrar of the High Court informed the Accountant General that the Government had been moved to amend Rule 5 (iv) of the Assam Judicial Service (Junior) Rules 1954. By a letter dated May 1, 1965, the State Government informed the High Court regretting its inability to take up the question of the amendment of Rule 5(iv) "at this stage".

6. On June 15, 1965, the Accountant General informed the High Court that, as the Government had not amended the Rules, the order of confirmation, communicated in the High Court's notification, dated May 1, 1964, was not in order. Thereupon the respondent No. 1 was informed by the High

Court by its letter, dated July 20, 1965, that the Accountant General had refused to accept his confirmation.

7. Respondent No. 1 thereupon filed a writ petition in the High Court. On September 12, 1966, the High Court allowed the petition. There were two judgments - one by Mehrotra, C.J., and the other by S. K. Dutta, J. The High Court refused certificate, but on July 21, 1967, this Court granted special leave to appeal.

8. Our Constitution makes specific provisions for appointment of district judges and for recruitment of the persons other than the district judges to the Judicial Service. It also makes provision for the control to be exercised over the subordinate Courts. The three articles are as follows :

"Article 233. - (1) 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.

#(2) X X X X"##

"Article 234. - 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 after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State".

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

9. As already indicated the respondent Sen was appointed to act as Additional Sub-Judge, Cachar, and he took charge on December 22, 1961. The High Court of Assam and Nagaland confirmed his appointment in the Judicial Service (Junior) Grade I, with effect from March 1, 1964.

10. Rule 5(iv), on the basis of which objection was raised by the Accountant General, is as follows :

"5. Appointment, probation and confirmation -

(iv) when a person is appointment to a permanent post, he will be confirmed in his appointment at the end of the period of probation or extended period of probation. In case of the Deputy Registrar and Assistant Registrar of the High Court confirmation shall be made by the High Court. In other cases it will be made by the Governor in consultation with the High Court."

11. Dealing with it, Mehrotra, C.J., observed as follows :

"It will be anomalous to hold that power of promotion and posting vests in the High

Court while the power of confirming an officer in the post vests in the Government. With regard to the scheme of the Constitution and the Rules, it is clear that Rule 5 (iv) applies to the persons who are appointed by direct recruitment to the post of a Sub-Judge and not to the persons who have been promoted. In my opinion, therefore, the power to confirm the judicial officers who have been promoted vests in the High Court."

12. On the other hand, S. K. Dutta, J., was of the view :

"In this connection it is not necessary to examine Rule 5(iv) of the Assam Judicial Service (Junior) Rules, 1954, on which the State of Assam and the Accountant General, Assam rely in their contention that a Subordinate Judge can be confirmed in his post only by the Government. If the rule is in conflict with any constitutional provision, it will be void and must be struck down."

13. Under the provisions of the Constitution itself the power of promotion of persons holding posts inferior to that of the district judge is in the High Court. It stands to reason that power to confirm such promotions should also be in the High Court.

14. This Court has on several occasions expressed its views on Article 235 of the Constitution. In *The State of West Bengal v. Nripendra Nath Bagchi*, ((1966) 1 SCR 771 : AIR 1966 SC 447) it was pointed out :

"In the case of the judicial service subordinate to the district judge the appointment has to be made by Governor in accordance with the rules to be framed after consultation with the State Publics Service Commission and the High Court but the power of posting, promotion and grant of leave and the control of the courts are vested in the High Court."

15. A year later, in *State of Assam v. Ranga Mahammed and others*, ((1967) 1 SCR 454 : AIR 1967 SC 903) this Court again observed] as follows :

"The High Court is in the day to day control of court and knows the capacity for work of individuals and the requirements of a particular station or Court. The High Court is better suited to make transfers than a Minister. For however, well-meaning a Minister may be he can never possess the same intimate knowledge of the working of the judiciary as a whole and of the individual judges, as the High Court. He must depend on his department for information. The Chief Justice and his colleagues know these matters and deal with them personally. There is less chance of being influenced by secretaries who may withhold some vital information if they are interested themselves. It is also well-known that all stations are not similar in climate and education, medical and other facilities. Some are good stations and some are not so good. There is less chance of success for a person seeking advantage for himself if the Chief Justice and his colleagues, with personal information, deal with the matter, than when a Minister deals with it on notes and information supplied by a secretary."

This observation was made in relation to a case of transfer, but it applies with greater force to the case of promotion. The result is that we hold that the power of promotion of persons holding posts inferior to that of the district judge being in the High Court, the power to confirm such promotions

is also in the High Court. We also hold that in so far as Rule 5(iv) is in conflict with Article 235 of the Constitution, it must be held to be invalid.

16. On the basis of the last part of Article 235, an argument was purported to be advanced that the power of the High Court as to promotions was limited. In view of the plain words of the first part of this article, this argument has no basis.

17. In this Court, no other point was made in support of this appeal.

18. The appeal, therefore, fails and is dismissed, but in the circumstances of the case with no order as to costs.

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