

The High Court of Punjab and Haryana and Others

Vs

The State of Haryana and Others

Civil Appeals Nos. 852, 854 and 1503 of 1974

(H. R. Khanna, K. K. Mathew, M. H. Beg JJ)

24.01.1975

JUDGMENT

RAY, C. J. –

1. These appeals by certificate raise the question as to whether the confirmation of N. S. Rao was to be made by the Governor or by the High Court.
2. Rao was appointed on June 23, 1970 on probation under Rule 9 of the Punjab Superior Judicial Service Rules 1963. He was appointed as District/Additional District & Sessions Judge. He assumed charge on July 7, 1970. On July 7, 1972 he completed two years of probation. On July 13, 1972 the High Court received a complaint from Mangat Rai Gaba. The High Court entrusted to Justice Gurnam Singh an enquiry into the complaint. On September 1, 1972 Rao was transferred to Ambala as District and Sessions Judge. On September 5, 1972 there was an order posting Rao as District and Sessions Judge, Karnal. On October 13, 1972 there was a letter from the State Department to the High Court, declining to issue notifications under Sections 20 and 21 of the Punjab Courts Act.
3. On February 13, 1973 the State Government addressed a letter to the High Court to send its views about the completion of probation by Rao. The High Court on February 26, 1973 considered the report of Justice Gurnam Singh who came to the conclusion that the charges against Rao were not substantiated. On March 8, 1973 the Government wrote another letter to the High Court asking for the record of service of Rao and the views of the High Court about the completion of probation by Rao. The Government also asked about the result of the enquiry along with the report. On April 10, 1973 the High Court replied to the above two letters saying that the matter of confirmation of promotees as well as of Rao a direct recruit was with the High Court and not with the Government.
4. On April 19, 1973 the High Court promoted Rao as permanent District and Sessions Judge, with effect from March 30, 1973. The Government on the same day wrote to the High Court saying that the view of the High Court about competency to confirm District and Sessions Judges was legally untenable. The High Court was requested to reconsider the matter and withhold issuance of notification confirming Rao. On May 4, 1973 the High Court in modification of the earlier notification of April 19, 1973 confirmed Rao as District and Sessions Judge with effect from July 7, 1972 on which date he completed the period of probation.
5. On May 26, 1973 the Government wrote to the High Court stating that the Government did not recognise the order of confirmation issued by the High Court. The Government further said that Rao would be deemed to be under extended period of probation. The Government said that the High Court would be well advised to review their earlier decision and send the requisite record without

any further delay. On June 1, 1973 the Government wrote to the High Court saying that the Government were of opinion that in view of the probationary period of Rao having been found to be unsatisfactory he was not fit to be retained on the post of District/Additional District and Sessions Judge and should be reverted to his substantive post of District Attorney. It may be stated here that Rao before he was appointed as Additional District and Sessions Judge was a District Attorney. The Government further requested the High Court that the matter might be placed before the Judges immediately so that the views of the High Court would be available to the Governor before the High Court went into vacation. On June 2, 1973 the High Court replied that the matter was under consideration of the Judges and their views would be communicated to the State Government early. It may be stated here that the vacation commenced on June 2, 1973. On June 12, 1973 the Government wrote to the High Court saying that if the views of the High Court were not received, the State Government would have no alternative but to take a final decision. On June 14, 1973 the High Court wrote to the Government that reply would be sent after the reopening of the High Court. The High Court reopened on July 15, 1973. On June 21, 1973 the Governor wrote a note approving action proposed by the Council of Ministers. There was a gazette notification reverting Rao from the post of District and Sessions Judge, Ambala to his former post of District Attorney.

6. Rao challenged the order of the Governor in an application under Article 226 in the High Court of Punjab and Haryana.

7. The High Court by a majority judgment held that the power to confirm is part of the power to appoint, and, therefore, the Governor being the appointing authority the confirmation is to be by the Governor on the advice of the Council of Ministers. The majority view of the High Court was that confirmation is not a matter of control of District Courts by the High Court.

8. The other findings of the High Court are as follows :

8a. First, all enquiries against an officer of the subordinate judiciary, whether for the purpose of punishing him, if found guilty, or for ascertaining his suitability or otherwise for confirmation, can be initiated and conducted by the High Court alone. The Government or any other authority without the concurrence of the High Court is not competent to initiate or hold any enquiry against a District Judge or a member of the Judicial Services of the State. The control vested in the High Court under Article 235 of the Constitution read together with the mandate of Article 233 of the Constitution, makes it clear that the High Court alone is competent to certify/recommend, advise, as to whether or not the probationer Rao had satisfactorily completed the period of probation.

9. Second, there has been both direct and indirect non-compliance with the constitutional mandate, viz., not consulting the High Court and consulting other persons who were not entitled to advise him. In making the order the Governor was influenced by an extraneous consideration, viz., the report of the Director, Special Enquiry Agency and thereby the provisions of Articles 233 and 235 were contravened.

10. Third, Rule 9 of the Appeal Rules was attracted and non-compliance with the mandatory provisions of Rule 9 is fatal to the order terminating the services of Rao.

11. Fourth, the order was not one of punishment, and, therefore, Article 311 was not attracted.

12. Fifth, no provision of the Constitution or statutory rules has been brought to the notice of the court which makes consultation with the High Court obligatory for the Governor before framing and issuing such Rules, though as a matter of sound administrative policy the Governor should before framing rules for the Judicial Services of the State, consult the High Court. Before amending and promulgating the amendment on April 21, 1972, the Government solicited the views of the High Court.

13. Sixth, there is no force in the contention that regulation of seniority is entirely a matter for the control of the High Court. This is a condition of service which can be regulated by the Governor in exercise of his legislative power under the proviso to Article 309 of the Constitution, though the fixation of seniority in accordance with such a rule would be matter within the jurisdiction of the High Court.

14. The High Court held that the order of confirmation of District/Additional District and Sessions Judge on probation has to be passed by the Governor in consultation with the High Court and in this view of the matter the order of confirmation of Rao passed by the High Court was ineffective. The allegation that the orders were the result of the mala fides has not been substantiated. The orders were invalid because they were based on an enquiry conducted by the Director, Special Enquiry Agency, otherwise than through or with the concurrence of the High Court and as such were violative of Article 235. The impugned orders were passed without effective consultation with the High Court and were violative of Article 233 of the Constitution. The mandate of Rule 9 of the Punjab Civil Service (Punishment and Appeal) Rules, 1952 hereinafter referred to as the Punishment Rules has not been complied with.

15. Appeals were preferred by the State as well as by Rao. The High Court also preferred an appeal.

16. On behalf of the State it is contended that the control of the High Court under Article 235 is neither absolute nor complete. It is subject to prescribed limitations as mentioned in Article 235. The Advocate General of Haryana contended that Article 233 applies to confirmation of appointments by direct recruitment and promotion. He relied on the decisions of this Court in *State of Assam v. S. N. Sen* ((1972) 2 SCR : (1971) 2 SCC 889) and *State of Assam v. Kuseswar Saikia* ((1970) 2 SCR 928 : (1969) 3 SCC 505) in support of the proposition that the appointing authority is the confirming authority.

17. The contentions of the Advocate General were these. Confirmation is the last step in the process of appointment which is made in the first instance on probation. Confirmation is nothing but the substantive appointment to service. The earlier tenure is precarious. Confirmation makes it firm. On a parity of reasoning given in *S. N. Sen's case* (supra) that the authority which promotes should confirm it stands to reason that the power of confirmation should vest in the authority which appoints. Confirmation and non-confirmation are so inextricably mixed that it will be anomalous to say that the power of confirmation is with the High Court and the power of termination on non-confirmation is with the Government. Transfer has no analogy with confirmation. Transfer brings in no change in tenure of service while confirmation does. Confirmation can be on appointment as well as promotion. Since both powers of appointment and promotion are with the Governor under Article 233 the confirming authority is the Governor. Either confirmation is a power of appointment or it is a condition of service. In both the situations the power lies with the Governor. Rule 10(2) of the Punjab Superior Judicial Service Rules hereinafter referred to as the Service Rules which states that on the completion of the period of probation the Governor may in consultation with the High Court confirm the direct recruit on a cadre post with effect from a date not earlier than the date on

which he completes the period of probation, is a condition of service and is therefore not ultra vires.

18. It is necessary at this stage to refer to the order of appointment of Rao. The order is as follows :

1. In exercise of the powers conferred under Rule 9, of the Punjab Superior Judicial Service Rules, 1963 the Governor of Haryana, on the recommendations of the Punjab and Haryana High Court, is pleased to appoint, on probation, Shri Narender Singh Rao, Assistant Advocate General, Haryana as District/Additional District and Sessions Judge, in the State of Haryana in the scale of Rs. 900 - 50 - 1000 - 60 - 600 - 50 - 1800 with effect from the date he assumes charge of the said post.

2. In all matters pertaining to seniority, probation etc. he will be governed by the provisions of Punjab Superior Judicial Service Rules, 1963.

3. Order relating to initial pay to be allowed to Shri Narender Singh Rao, will be issued separate.

Note 2 : Proposals regarding the fixation of pay of Shri Narender Singh Rao, on appointment as District/Additional District & Sessions Judge, Haryana, may please be forwarded to Government as early as possible.

19. Rule 9 of the Service Rules speaks of appointment of direct recruits. Rule 10 of the Service Rules speaks of probation of direct recruits. Direct recruits shall remain on probation for a period of two years, which may be so extended by the Governor in consultation with the High Court, as not to exceed a total period of three years. On the completion of the period of probation the Governor in consultation with the High Court confirms the direct recruit on a cadre post with effect from the date not earlier than a date on which he completes the period of probation. If the work or conduct of a direct recruit has, in the opinion of the Governor, not been satisfactory he may, at any time during the period of probation or the extended period of probation, if any, in consultation with the High Court and without assigning any reason dispense with the services of such direct recruit.

20. The Advocate General relied on the notes to Rule 2.49 of the Punjab Civil Service Rules which defines the probationer. Rule 2.49 is as follows :

"Probationer" means a Government servant employed on probation or against a substantive vacancy in the cadre of a department. This term does not however cover a Government servant who holds substantively a permanent post in a cadre and is merely appointed "on probation", to another post.

It is stated in Note 2 that no person appointed substantively to a permanent post in a cadre is a probationer unless definite conditions of probation have been attached to his appointment, such as the condition that he must remain on probation pending the passing of certain examinations. It is said by the State that this is not the present case. Note 3 states that the provisions of Rule 2.49 and Note 2 are to be taken as complementary. Taken together Note 3 states that they contain the essence of the tests for determining when a Government servant should be regarded as a probationer, or as merely 'on probation' irrespective of whether he is already a permanent Government servant or is merely a Government servant without a lien on any permanent post. While a probationer is one appointed in or against a post substantively vacant with definite conditions of probation, a person on probation is one appointed to a post not necessarily vacant substantively for determining his fitness for eventual substantive appointment to that post. There is nothing in this rule to prevent a

Government servant substantive in one cadre from being appointed as a probationer in or against a post borne on another cadre with definite conditions of probation such as the passing of departmental examinations which are prescribed. In such a case the Government servant should be treated as a probationer.

21. It is said by the Advocate General that no definite conditions of probation were attached to the appointment of Rao and he is not a probationer but on probation, and, therefore, Rule 9 of the Service Rules is not attracted. Rule 9 is as follows :

Where it is proposed to terminate the employment of a probationer, whether during or at the end of the period of probation, for any specific fault or on account of the unsatisfactory record or unfavourable reports implying the unsuitability for the service, the probationer shall be apprised of the grounds of such proposal, and given an opportunity to show cause against it, before orders are passed by the authority competent to terminate the appointment.

22. He gave two reasons as to why Rule 9 is not attracted. First, Rao is on probation and not a probationer and Rule 9 only speaks of probationer. Second, it is not a case of termination of employment because Rao was under the order asked to go back to his substantive post of District Attorney, and, therefore, it was not a case of termination.

23. It is true that the order of appointment of Rao states that he is appointed on probation with effect from the date he assumes charge of the post. Rule 10 of the Service Rules provides that the probation is for two years and that it can be extended. It is apparent that Rao was appointed on the condition that he had to give satisfactory performance with regard to his work and conduct during the period of probation in order to qualify for confirmation. Rao was directly recruited on probation in a substantive vacancy in the cadre of the Superior Judicial Service. Mere use of the words "on probation" is not conclusive. Rao was a probationer because he was appointed against a post substantively vacant with definite conditions of probation. Rao therefore became a probationer. His probation could be extended so as not to exceed three years.

24. Article 233 states that 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.

25. Article 234 states that appointments of person 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.

26. Article 235 states that 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 authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

27. Article 236 states that the expression district judge 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.

28. The appointment of persons to be district judges is vested in the Governor of the State under Article 233. The words posting and promotion of district judge in Article 233 have been construed by this Court to mean posting and promotion of persons to be district judges. The words "appointment of persons to be and the posting" in Article 233 have been held by this Court to mean initial appointment by direct recruitment of persons to be district judges and the posting mentioned there is the initial posting. Promotion of district judges has been expanded to mean promotion of persons to be district judges.

29. The Advocate General submitted that the control of the High Court under Article 235 is subject to limitation. These limitations are laws regulating conditions of service. There may not only be right of appeal under the conditions of service but in the present case Rule 10 of the Service Rules being the conditions of service speaks of confirmation of probationer by the Governor in consultation with the High Court. Such rules are said by the Advocate General to be protected under Article 235 within the conditions of service and excluded from the control of the High Court.

30. The question of control by High Court of subordinate courts was considered by this Court in *State of W. B. v. Nripendra Nath Bagchi* ((1966) 1 SCR 771 : AIR 1966 SC 447 : (1968) 1 LLJ 270). Bagchi was Additional District and Sessions Judge. Bagchi officiated as District and Sessions Judge but was not confirmed as such. Bagchi was due to retire on July 31, 1953. By an order dated July 14, 1953, the State Government ordered that Bagchi be retained in service for a period of two months commencing August 1, 1953. By another order dated July 20, 1953, Bagchi was placed under suspension. On the following day Bagchi was served with 11 charges. An enquiry into the charges was made by an officer appointed for the purpose. The Enquiry Officer reported that some of the charges were proved. Bagchi was asked to show cause on March 18, 1954 as to why he should not be dismissed from service. Bagchi was dismissed on May 27, 1954.

31. This Court in Bagchi's case (*supra*) considered two questions. First, whether the enquiry ordered by the Government and conducted by an executive officer of the Government against the District and Sessions Judge contravened the provisions of Article 235 of the Constitution which in the High Court the control over district courts and courts subordinate thereto. Second, whether Rule 75(a) of the West Bengal Service Rules could be utilised to extend the service of Bagchi beyond the normal age of retirement.

32. This Court held in Bagchi's case (*supra*) that the rule was modelled on Rule 56(a) of the Fundamental Rules and was not designed to be used for the purpose of retaining a person in service for enquiry against him but to keep in employment persons with meritorious record of service and whose retention in service is considered necessary on public grounds. If retention in service for enquiry was needed a rule similar to Rule 56(a) of the Fundamental Rules was required.

33. On the question of control by the High Court under Article 235 this Court held in Bagchi's case (*supra*) that the word "control" as used in Article 235 includes disciplinary control or jurisdiction over district judges. This control is vested in the High Court to effectuate a purpose, namely, the securing of the independence of the subordinate judiciary and unless it includes disciplinary control the very object would be frustrated. The word "control" is accompanied by the word "vest" which shows that the High Court is made the sole custodian of the control over the judiciary. Control is not

merely the power to arrange the day to day working of the court but contemplates disciplinary jurisdiction on the presiding judge. The word "control" includes something in addition to mere superintendence over these courts. The control is over the conduct and discipline of judges. The inclusion of a right of appeal against the orders of the High Court in the conditions of service indicates an order passed in disciplinary jurisdiction. The word "deal" in Article 235 also indicates that the control is over disciplinary and not mere administrative jurisdiction. The word "court" in the term "district court" is used compendiously to denote not only the court proper but also the presiding judge. The control which is vested in the High Court is complete control subject only to the power of the Governor in the matter of appointment including dismissal and removal and initial 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 to the conditions of service and to the giving of an opportunity of showing cause as required by Article 311(2) unless such an opportunity is dispensed with by the Governor acting under the provisos (b) and (c) to that clause. The High Court alone will make enquiry into disciplinary conduct.

34. The Advocate General on behalf of the State submitted that the control of the High Court is subject to limitations and these limitations are conditions of service. If under the conditions of service confirmation is to be made by the Governor, this is said to be a limitation on the control of the High Court. That turns on the primary question whether confirmation is within the power of appointment.

35. In the High Court, *Calcutta v. Amal Kumar Roy* (1963) 1 SCR 437 : AIR 1962 SC 1704)) the respondent asked for a declaration that he was senior in the cadre of Subordinate Judges if no supersessions had taken place. This Court held that Article 235 read with Service Rules showed that a Munsif had no right to promotion which could be enforced through court. It is not correct to say that the High Court should have consulted the State Public Service Commission because Article 320(3) (c) contemplated disciplinary matters. There was no reduction in rank of the respondent in that case. All Subordinate Judges were in the same cadre and held the same rank irrespective of seniority. Losing place in the seniority list did not amount to reduction in rank.

36. In *Chandra Mohan v. State of U. P.* ((1967) 1 SCR 77 : AIR 1966 SC 1987 : (1967) 1 LLJ 412) this Court considered Article 233 and the question of appointment of district judges. The appellant in that case challenged the recruitment of district judges. The Governor under the Rules decided on the number of candidates to be selected. A Selection Committee was constituted under the Rules. The High Court submitted to the Government a list of candidates considered suitable for appointment. The Governor made the appointments from the list. It was contended that under Article 233 the Governor has to make the appointments in consultation with the High Court concerned and under the rules he had to consult the Selection Committee, and, therefore, the appointments made in consultation with two authorities instead of one were illegal.

37. It was held in *Chandra Mohan's case* (supra) that under Article 233 the Governor can appoint a person to the post of a district judge from the services only in consultation with the High Court. This Court is exhaustive of the service because the expression means 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. The Judicial Service is the exclusive service of judicial officers. In the case of appointment of persons to the Judicial Service other than district judges, they will be made by the Governor in accordance with rules framed by him in consultation with the High Court and the Public Service Commission. But the High Court has control over all the district courts and courts

subordinate thereto, subject to certain prescribed limitations.

38. The Selection Committee under Rule 13 in Chandra Mohan's case (*supra*) was to consist of two judges of the High Court and the Judicial Secretary to the Government. The Selection Committee under Rule 17 was to draw up a list of candidates selected. The High Court was to submit to the Governor the list of candidates considered suitable for appointment from two sources of recruitment, viz., direct recruitment and recruitment by promotion. This Court said that the Selection Committee reduced the High Court to the position of transmitting authority. The High Court could not scrutinise the other applications which were screened by the Selection Committee. The High Court could not recommend persons for appointment not found in the list. This Court therefore held the Rules regarding Selection Committee to be unconstitutional.

39. In *State of Assam v. Ranga Mahammad* ((1967) 1 SCR 454 : AIR 1967 SC 903 : (1968) 1 LLJ 282) this Court considered as to whether the High Court or the State Government was the competent authority for transfer of a district judge. The High Court held that the High Court alone could order transfer and in any event the High Court was to be consulted and was not consulted before the orders were made. This Court held that the Governor is only concerned with the appointment, promotion and posting to the cadre of district judges and not with the district judges already appointed, promoted and posted to the cadre. The word "posting" in Article 233 was held to mean to station someone at a place or to assign someone to a post. The words "appointment, posting and promotion" indicate the stage where a person first gets a position or job and "posting" by association means the assignment of an appointee or promotee to a position in the cadre of district judges. The word "posting" cannot be understood in the sense of "transfer" when the idea of appointment and promotion is involved in the combination. If posting was intended to mean transfer the draftsman would have hardly chosen to place it between "appointment" and "promotion".

40. The Governor under Article 233 is only concerned with the appointment, promotion and posting to the cadre of district judges but not with the transfer of district judges already appointed or promoted and posted to the cadre. Transfer is a matter of control over district courts which is vested in the High Court. In Article 234 the question of appointment of persons other than district judges to the Judicial Service is contemplated. In Article 235 the posting and promotion of persons belonging to the Judicial Service of the State and holding any position inferior to the post of district judge is contemplated. The word "post" is used twice in Article 235 to mean the position or job and not the station or place and therefore posting means assignment to a position or job. In *Ranga Mahammad's* case (*supra*) this Court said that transfer of incumbents is a matter within the control of district courts including the control of persons presiding there and the High Court is the authority to make transfer, and there is no question of consultation on that ground. The State Government is not the authority to order transfer.

41. In *G. S. Nagmoti v. State of Mysore* ((1969) 3 SCC 325) this Court considered the meaning of the word "control" in Article 235. At the request of the High Court the Government appointed a judge to hold the departmental enquiry into the conduct of a judicial officer. The learned Judge of the High Court held the departmental enquiry and found the judicial officer guilty of the charge. He recommended to the Governor that the judicial officer might be reduced in rank and might not be considered for promotion for two years. The Governor compulsorily retired the judicial officer from service. The judicial officer thereafter filed a writ petition contending that the compulsory retirement was in contravention of Article 235 because it was the High Court alone which has power of holding disciplinary proceedings against the judicial officers. This Court held that the word "control" in Article 235 includes disciplinary control and jurisdiction over district judges. The

control of the High Court is not merely the power to arrange day to day working of the Court but contemplates disciplinary jurisdiction over the presiding Judge. This Court did not examine the contentions of the judicial officer because the High Court had dismissed the petition in limine. The matter was remitted to the High Court for disposal in accordance with law.

42. In *Chandramouleshwar Prasad v. Patna High Court* ((1970) 2 SCR 666 : (1969) 3 SCC 36) it was said that under Article 233 the appointment of a person to be district judge rests with the Governor but he must make the appointment in consultation with the High Court. The Governor should make up his mind after there has been a deliberation with the High Court. The consultation is not complete or effective before the parties thereto make their respective points of view known to the other or others. It was said that the Governor cannot discharge his functions under Article 233 if he makes the appointment of a person without ascertaining the points of view of the High Court with regard thereto.

43. In *State of Assam v. Kuseswar Saikia* (supra) Article 233 was considered as to whether the appointment of a person belonging to the State Judicial Service to officiate as Additional District and Sessions Judge was within the power of the Governor or the High Court. The High Court held that the promotion of Rajkhowa by the Government as Additional District Judge was void because he could only be promoted by the High Court under Article 235. The Assam Judicial Service consisted of the senior branch and the junior branch. The senior branch consisted of two grades. The first grade consisted of the posts of Registrar, Legal Remembrancer, District Judges. The second grade consisted of the post of Additional District and Sessions Judges. The junior branch in Grade I consisted of the post of subordinate judges and Deputy Registrar. The junior branch in Grade II consisted of Munsif and Assistant Registrar. Rajkhowa was appointed as Deputy Registrar from the grade of Munsif. Thereafter the Governor appointed the Rajkhowa to officiate as Additional District and Sessions Judge.

44. This Court held in *Kuseswar Saikia's* case (supra) that the High Court has 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.

45. The expression "Judicial Service" is defined in Article 236 to mean a service consisting exclusively of persons intended to fill the post of district judge. The expression "district judge" includes among others an additional district judge and an additional sessions judge. The promotion of persons belonging to the Judicial Service but holding a post inferior to the district judge vests in the High Court. Because 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. It is the function of the Governor to promote additional district judge and additional sessions judge to be district judges.

46. This Court held that under Article 233 the appointment as well as promotion of persons to be district judges is a matter for the Governor in consultation with the High Court. District judges are directly appointed or are promoted from the subordinate rank of the Judiciary. The initial appointment as well as the initial promotion of persons to be district judges is with the Governor.

47. In *Kuseswar Saikia's* case (supra) this Court said that further promotion of district judges is a matter of control of the High Court. Therefore, the initial appointment of persons to be district judges as well as the initial promotion of persons to be district judges is with the Governor. Once

they are appointed and promoted to be district judges the entire control is thereafter vested in the High Court. As to what further promotion of district judges can be, is illustrated by their appointment to selection grade posts.

48. In *State of Assam v. S. N. Sen* (supra) a question arose as to who was the proper authority for confirming a member of the Assam Judicial Service. Sen was confirmed by the High Court in Judicial Service Grade I against the post of Subordinate Judge. The relevant rule provided that

when a person is appointed to a permanent post he will be confirmed after the period of probation in the case of Deputy Registrar and Assistant Registrar by the High Court and in other cases it will be made by the Governor in consultation with the High Court.

The Accountant General refused to accept the confirmation made by the High Court. This Court held that under Article 235 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. The Advocate General relied on this decision and said that if the power of appointment was with the Governor under Article 233 the power of confirmation was with the Governor because under the process of appointment is not complete until confirmation.

49. The confirmation of persons appointed to be or promoted to be district judges is clearly within the control of the High Court for these reasons. When persons are appointed to be district judges or persons are promoted to be district judges the act of appointment as well as the act of promotion is complete and nothing more remains to be done. Confirmation of an officer on successful completion of his period of probation is neither a fresh appointment nor completion of appointment. Such a meaning of confirmation would make appointment a continuing process till confirmation. Confirmation of district judges is vested in the control of the High Court for the reason that if after the appointment of district judges the Governor will retain control over district judges until confirmation there will be dual control of district judges. The High Court in that case would have control over confirmed district judges and the Governor would have control over unconfirmed district judges. That is not Article 235.

50. In the recent decision in *Samsher Singh v. State of Punjab* ((1974) 2 SCC 831 : 1974 SCC (L & S) 550) this Court held that the High Court under Article 235 is vested with the control over subordinate Judiciary. This Court said that before a probationer is confirmed that authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or he is suitable for the post. In the absence of any rules governing the probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this. The suitability of a person to a post is of paramount importance in considering the question of confirmation.

51. District judges can be promoted to selection grade posts. Similarly, grant of leave to the district judge is vested in the High Court. The control over district judges includes also the posting of district judges.

52. The Governor has power to pass an order of dismissal, removal or termination on the recommendations of the High Court which are made in exercise of the power of control vested in the High Court. The High Court of course under this control cannot terminate the services or impose any punishment on district judges by removal or reduction. The control over district judges is that

disciplinary proceedings are commenced by the High Court. If as a result of any disciplinary proceedings any district judge is to be removed from service or any punishment is to be imposed that will be in accordance with the conditions of service.

53. The order passed by the Governor shows that the State considered Rao to have committed serious irregularities which made him unfit for confirmation. It is indisputable that Rao was promoted to the post of District and Sessions Judge. His reversion carries a stigma as well as reduction in rank, and, therefore, he was entitled to be given an opportunity to show cause against the proposed action within Rule 9.

54. The conclusion of the majority judgment that the order of confirmation is to be passed by the Governor in consultation with the High Court is erroneous and is set aside. Rule 10 which confers power on the Governor to confirm is ultra vires the Constitution. The order of confirmation of District and Sessions Judge is to be passed by the High Court. The unanimous view quashing the order passed by the Governor directing the removal because the same was based on enquiry conducted by the Director, Special Enquiry Agency, otherwise than through or with the concurrence of the High Court is upheld. The unanimous view that the provisions of Rule 9 of the Punjab Civil Service (Punishment and Appeal) Rules are not complied with is upheld.

55. This Court in the majority view in *Samsher Singh v. State of Punjab* (supra) pointed out that the High Court is to hold the enquiry preferably through district judges. The members of the subordinate Judiciary look up to the High Court for discipline and dignity. The enquiry conducted by the Director of Special Enquiry was unconstitutional.

56. The majority view of the High Court upheld the seniority rule in the Punjab Superior Judicial Service Rules, 1963. This question was not in issue before the High Court. We have not gone into the question. We express no opinion on the seniority rule which is Rule 12 in the Punjab Superior Judicial Service Rules, 1963.

57. For these reasons, the appeal of Rao is accepted and the appeal of the State is dismissed. The appeal of the High Court is disposed of accordingly. The appellant Rao is entitled to costs in this appeal. There will be one set of costs to be paid by the State.

58. For the sake of abundant caution it is made clear that in other cases where the order of confirmation of district judge has already been passed by the Governor of a State in consultation with the High Court this judgment shall not affect the validity of those instances of confirmation.

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