State of Kerala

Vs

M. K. Krishnan Nair and Others

K. Sukumaran Nair and Another

Vs

M. K. Krishnan Nair and Others

Civil Appeal Nos. 2047 and 2048 of 1974

(CJI M. H. Beg, P. N. Bhagwati, V. D. Tulzapurkar, P. N. Singhal, Jaswant Singh, Syed M. Fazal Ali, V. R. Krishna Iyer JJ)

14.02.1978

JUDGMENT

TULZAPURKAR, J. (for himself, Beg, C.J., Bhagwati, Krishna Iyer, Fazal Ali and Jaswant Singh, JJ.) -

1. These two appeals by special leave - one by the State of Kerala (Original Respondent No. 1) and the other by Messrs. K. Sukumaran Nair and O.J. Antony (Original Respondents Nos. 3 and 4, being Judicial Officers on the Criminal Side) - are directed against the judgment and order of the Kerala High Court of February 8, 1974 in O.P. (Writ Petition) No. 3639 of 1973, whereby the High Court quashed two Government Orders dated February 12, 1973 and September 18, 1973 (being Exhs. P1 and P2) bifurcating the Judicial Service of the Kerala State into two Wings - Civil and criminal - and the two sets of Statutory Rules, the Kerala Civil Judicial Service Rules, 1973 and the Kerala Criminal Judicial Service Rules, 1973 (being Annexures III and IV to the additional counter-affidavit of the State dated November 26, 1973) framed for the two wings of the judicial Service thus formed, as being violative of Articles 14 and 16 of the Constitution.

2. The challenge to the constitutional validity of the two Government Orders Exhs. P1 & P2 and the two sets of Rules Annexures III and IV mentioned above arose at the instance of Shri M. K. Krishnan Nair (Original Petitioner, being a Judicial Officer on the Civil Side) in these circumstances : The Original petitioner was appointed as Munsiff in the Kerala Judicial Service on June 10, 1958 and was confirmed in that post on July 1, 1961. While serving as Munsiff, he was posted as Sub-Divisional Magistrate, Alwaye, and was for some time put in full additional charge of the post of District Magistrate (Judicial), Ernakulam, from January 16, 1963 to January 31, 1963. He was then transferred and posted as Munsiff, Vaikom, and on October 3, 1968 was promoted as Sub-Judge in which post he was subsequently confirmed. At the material time when the scheme of bifurcation of the Kerala Judicial Service into two wings - Civil Wing and Criminal Wing - was sought to be put into operation, he had been transferred and was posted as Land Reforms Appellate Authority at Kozhikode. The petitioner's case was that prior to February 12, 1973, as a result of several Government Orders, Statutory Directions and Rules issued under Articles 234 and 237 of the Constitution from time to time, the posts of District Magistrates, and Sub-Divisional Magistrates on

the Criminal Side have been integrated with those of Sub-Judges and Munsiffs on the Civil Side respectively and a complete integrated Kerala State Judicial Service had come into existence but an or about February 12, 1973, in consultation with the Kerala High Court, the State of Kerala decided to have a scheme to bifurcate and constitute two separate wings for the Civil and Criminal Judiciary respectively in the State, the former consisting of Sub-Judges and Munsiffs and the latter consisting of the District Magistrates (Judicial), Sub-Divisional Magistrates, Additional First class Magistrates and Sub-Magistrate, that the two services should be designated as Kerala Civil Judicial Service and Kerala Criminal Judicial Service, and that Rules for the said two new services would be issued separately. This decision of the State Government is to be found in Government Order MS 24/73 Home dated February 12, 1973, at Exh. P1. For implementing the aforesaid scheme of bifurcating the Judiciary into two wings, the G.O. at Exh. P1 also contains certain directions in para 3 thereof, namely - (a) that option will be allowed to all Civil Judicial Officers originally borne on the Magistracy, irrespective of whether or not they have been confirmed as full members in the Kerala State Judicial Service, to go over to the Criminal Wing [para 3 (i); (b) that those who opt to the Criminal Wing and whose options would be accepted by the Government, will be given posting in the new Criminal Judicial Service only to the posts they would hold on the basis of their original rank in the Magistracy and not with reference to their present position in the State Judicial Service [para 3 (ii)]; (c) that all the posts of Sub-Divisional Magistrates will be released for members of the new Criminal Judicial Service and the present incumbents in the posts of Sub-Divisional Magistrates will accordingly be posted back as Munsiffs, with the implementation of the scheme [para 3(iii); (d) that persons who have been appointed as District Magistrates on or before the date of implementation of the scheme will be allowed to continue as such, retaining their membership in the Civil Judiciary, till they are appointed to the Higher Judicial Service or retire from service [para 3(iv); (e) that if the number of officers who opt to the Criminal Wing happens to be in excess of the number of posts available for accommodating them in the Criminal Judicial Service, such officers found in excess will be retained in the Civil Judiciary for eventual absorption in the Criminal Judiciary as and when vacancies arise, consistent with their original seniority in the Criminal Wing [para 3(v)]; and (f) that the options once exercised shall be final [para 3(vi)]. Two month' period from the date of the Order was allowed for the officers to exercise their option. According to the petitioner by way of implementing the aforesaid scheme 15 officers exercised their option to go over to the Criminal Wing but the option of one Smt. P. Komalavally, not being unconditional, was not accepted while the options of all the remaining 14 were accepted. In accordance with para 3(iii) of Exh. P1 all the posts of Sub-Divisional Magistrate were released for the members of the Criminal Judiciary and in accordance with para 3(v) as the number of officers whose options were accepted was 14 and only 9 posts of Sub-Divisional Magistrate were released and became available immediately, the seniormost five officers out of the 14 were retained in their posts in the Civil Judiciary for their eventual absorption in the Criminal Judiciary as and when vacancies would arise consistent with their original seniority in the Criminal Wing. This partial implementation of the scheme has been recorded in the G.O. MS 157/73/Home dated September 18, 1973 at Exh. P2. As was decided in G.O. dated February 12, 1973 (Exh. P1), the two new sets of Rules called the Kerala Civil Judicial Service Rules, 1973 and the Kerala Criminal Judicial Service Rules, 1973 (being Annexures III and IV respectively to the counter-affidavit of the State dated November 26, 1973) governing the constitution, recruitment, qualifications, probation, tests, posting and transfers of the incumbents in each of the two services came to be framed in due course and these Rules were brought into force with effect from September 18, 1973.

3. By a letter dated March 28, 1973 the petitioner was required to forward his option in terms of the aforesaid scheme, but since under para 3(i) of Exh. P1 he was not eligible to exercise the option, as

he was not "originally borne on the Magistracy", he sent a reply stating that "the question of option does not arise" in his case. But according to him, several of his juniors in Judicial Service, who were originally recruited in the Magisterial service, opted to the Criminal Wing, to their advantage of being posted as Direct Magistrate (Judicial) and he has been denied that denied that opportunity because the option contemplated by the scheme of bifurcation has been confined or restricted to only those Civil Judicial Officers "originally borne on the Magistracy" and, therefore, the scheme of bifurcation with such restricted with such restricted option suffers from the vice of hostile discrimination against Judicial Officers like him who were initially recruited on the Civil Side. The petitioner raised a two-fold contention by way of challenging the constitutional validity of the scheme of bifurcation as contained in Ext. P1, the partial implementation thereof as recorded in Ext. P2 and the two sets of Rules framed for the two Wings of the Judicial service formed pursuant to the scheme. In the first place, according to him, prior to the introduction of the aforesaid scheme of bifurcation there has come intro existence one integrated Judicial Service for the State of Kerala as a result of several Government orders, Statutory, Statutory Directions, and Rules issued under Articles 234 and 237 of the Constitution from time to time, in which posts of District Magistrates and Sub-Divisional Magistrates has been integrated with those of Sub-Judges and Munsiffs respectively and, therefore, after such integration, to mark off all the Magisterial posts alone and constitute into a separate category with a separate avenue of promotion, leaving the officers and posts of Civil Judiciary to carve out a different channel of promotion was unjustified, discriminatory and violative of Articles 14 and 16 of the Constitution : secondly, the scheme of bifurcation as contained in Ext. P1, in so far as it confined the option only to Civil Judicial Officers "originally borne on the Magistracy", was unconstitutional and discriminatory as opportunity to exercise similar option was denied to persons like him who were not "originally borne on the Magistracy" but were recruited under the Travancore-Cochin Munsiff's Recruitment Rules, 1953. It was contended that there was no rational justification for confining the option only to those who were "originally borne on the Magistracy" and that whole scheme of bifurcation has been geared to irrational classification and the impugned orders and the Rules resulting in the disintegration of an integrated service deserved to be quashed.

4. On the other hand, on behalf of the State of Kerala and original respondents 3 and 4(being officers borne on the Criminal side) it was disputed that there was any complete integration of the posts of District Magistrates and Sub-Divisional Magistrates with those of Sub-Judges and Munsiffs on the Civil Side or that an integrated Judicial Service for the State had come into existence as contended by the petitioner. It was pointed out by the State of Kerala in its counter-affidavit dated November 17, 1973, that the former set of posts were not Civil Judicial posts coming within the meaning of "Judicial Service" as defined in Article 236(b) of the Constitution and further that though under G. O. MS 368/Home dated April 28, 1959, issued by the Government of Kerala under Article 237 the provisions of Articles 234 and 235 of the Constitution has been made applicable to all classes of Judicial Magistrates with effect from May 1, 1955 meaning thereby that all classes of Judicial Magistrates as regards their recruitment, posting, promotion etc. had been brought under control of the High Court, no specific provisions had been made in the Rules fixing the qualifications and method of appointment to the posts of District Magistrates and Sub-Divisional Magistrates and further there was no provision, which required that only a Sub-Judge shall be posted as a District Magistrate and that under Rule 5 read with Rule 20 of the Kerala State Judicial Service Rules (Special Rules), 1966, Sub-Judges, as a matter of practice, used to be posted as District Magistrates and Munsiffs as Sub-practice, used to be posted as District Magistrates and Munsiffs as Sub-Divisional Magistrates but such postings did not deprive them of their status as Sub-Judges or Munsiffs in the Judicial Service. In other words, it was contended that in the absence

of a complete integrated Judicial Service, there was no question of disintegrating the service as a result of the scheme contained in Exh. P1 being put into operation. It was further contended that the decision to bifurcate the Kerala State Judicial Service into two wings - Civil Wing and Criminal Wing as per Exh. P1 - was taken in consultation with the High Court of Kerala in deference to the considered view of the High Court that experience showed that the erstwhile practice of posting Sub-Judges as District Magistrates and Munsiffs as Sub-Divisional Magistrates needed a revision, first on the ground that the persons working as Sub-Magistrates and Additional First class Magistrates will make better Sub-Divisional Magistrates and District Magistrates and, secondly, on the ground that the practice was bound to cause justifiable heartburning and discontentment among the members of the Magisterial Service, for, it meant that all but a very few Sub-Divisional Magistrates and Additional First Class Magistrates would have to retire as such, without any chances of promotion, and that with few chances of promotion, direct recruitment from the Bar would be difficult and of poor quality. The classification into two wings as contemplated by the scheme was thus a reasonable classification based on an intelligible differentia and the same had reasonable nexus with the object sought to be achieved, namely, to secure better administration of justice on the criminal side. It was further contended that the option specified in para 3(i) of Exh. P1 was to operate qua the existing incumbents in service and not in future as was clear from the fact that the two sets of Statutory Rules (Annexures III and IV) did not and do not provide for any option whatsoever and as such these Rules were in any event free from any blemish.

5. After tracing the history of the Statutory Rules and Government Orders, issued from time to time, relating to the separation of judiciary from executive and principally relying upon Instructions contained in G.O. MS 851/PUB/ (Integration) dated September 24, 1959, Rules made under Article 234 as contained in G. O. MS 850 dated September 24, 1959, Ad hoc Rules for absorption of T.C. Criminal Judicial Officers under Article 234 read with Article 309 dated February 2, 1966 and the Kerala State Judicial Service Rule(Special Rules) dated October 5, 1966, the High Court came to the conclusion that there was an integration of the posts of District Magistrates and Sub-Divisional Magistrates with those of Sub-Judges and Munsiffs and an absorption of the Magisterial posts into the Civil Judiciary and that, therefore, the singling out of certain posts from the integrated service for a separate avenue of promotion would be discriminatory. The High Court held that the Government Orders at Exhs. P1 and P2 by which two separate wings, namely, Civil and Criminal, were constituted in the Judiciary of the State were invalid on two grounds : (a) that the separation into wings and the carving out of separate promotional avenues in the Magisterial section of the Judiciary, which had been integrated with and absorbed into the Civil Judicial posts, was discriminatory and irrational; and (b) that Exhs. P1 and P2 which restricted the exercise of option to get into the Criminal Judiciary only to officers borne on the Magistracy were discriminatory and hit by Articles 14 and 16 of the Constitution. In coming to this conclusion the High Court placed strong reliance on a decision of this Court in State of Mysore v. Krishna Murthy ((1973) 2 SCR 575 : (1973) 3 SCC 559 : 1973 SCC (L & S) 190 : (1973) 1 LLJ 42 : AIR 1973 SC 1146). According, by its judgment and order dated February 8, 1974, the High Court quashed and set aside the Government Orders at Exhs. P1 and P2 as also the two sets of Statutory Rules, being Annexures III and IV governing the recruitment and conditions of service of the said two wings. It is this judgement and order of the High Court that has been challenged by State of Kerala in Civil Appeal No. 2047 of 1974 and by original respondents Nos. 3 and 4 (being Judicial Officers on the Criminal Side) in Civil Appeal No. 2048 of 1974.

6. In support of the appeals, counsel for the appellants contended that the power of the State Government to bifurcate its Judicial Services into two wings - Civil and Criminal - and to frame separate Statutory Rules governing the recruitment and conditions of service of the incumbents of

each wing could never be disputed and as such the two sets of Rules being Annexures III and IV, especially when neither contains any provision for exercising any option by any Judicial Officer, could not be questioned under Articles 14 and 16 of the Constitution. As regards the scheme of bifurcation of Kerala Judicial Service into two wings, Civil and Criminal, containing an option given to the officers 'Originally borne on the Magistracy' as envisaged in Exhs. P1 and P2, a two-fold contention was urged before us. In the first place, it was contended, particularly by counsel for the appellants in Civil Appeal No. 2048 of 1974 - counsel for the State of Kerala being slightly lukewarm in that behalf - that there had been no integration of the Judicial Officers on the Criminal Side with those on the Civil Side in the State of Kerala at any time and that the material on which the original petitioner as well as the High Court have relied, does not indicate that there was any such integration between Officers belonging to the two Sides or that a complete integrated Judicial Service had come into existence in the State of Kerala prior to February 12, 1973, that Judicial Officers belonging to Civil Side as well as Criminal Side always constituted separate cards of service, and that, therefore, there having been no integration between the two there could be no complaint about any hostile or adverse treatment being meted out to one class of Officers as against the other in breach of either Article 14 or Article 16 of the Constitution; in other words, neither Article 14 nor Article 16 was attracted to the facts of the case at all inasmuch as the Officers belonging to the two wings never nor are similarly situated or identically circumstances. Secondly, it was contended that even if it were assumed that a complete integrated Judicial Service had come into existence in the State of Kerala prior to February 12, 1973, the classification of Judicial Officers belonging to such integrated service into two categories or wings, namely, Civil Wing and Criminal Wing, was based on an intelligible differentia and the same has reasonable nexus with the object sought to be achieved by the scheme of bifuration and the Rules framed in furtherance of the scheme. It was pointed out that the justification for bifurcating the Judicial Service into two wings as also for confining the option to those Officers who were originally borne on the Magistracy lay in the considered view of the High Court, which has been accepted by the State Government, that persons who have worked as Sub-Magistrates and Additional First Class Magistrates will make better Sub-Divisional Magistrates and District Magistrates and that a contented, efficient Criminal Judiciary with attractive promotional chances was desirable and as such the bifurcation or classification under Exhs. P1 and P2 was reasonable and not assailable under Article 14 or Article 16. As regards the option contained in Exh. P1, Mr. Lal Narain Sinha, counsel for the State of Kerala, raised a further alternative contention that if the words "originally borne on the Magistracy" occurring in para 3(i) of Exh. P1 were constructed to mean that the opinion was intended for the benefit of all those Officers who were borne on the Magistracy and worked as Magistrates at any time but before the scheme was put into operation (the expression'originally' meaning 'before or prior to the scheme'), the hostile treatment as suggested would disappear. On the other hand, counsel on behalf of the original petitioner, who has been respondent No. 1 in both the appeals, supported the view taken by the High Court and pressed if for our acceptance.

7. It was not and cannot be disputed that it is open to the State Government to constitute as many cadres in any particular service as it may choose according to the administrative convenience and expediency and, therefore, if in February 1973, the State of Kerala thought of bifurcating its Judicial Service into two wings - Civil and Criminal - and further thought of framing separate Statutory Rules government the recruitment and conditions of service of the incumbents of each wing, no fault could be found with any decision taken by it in that behalf. However, the gravamen, of the original petitioner's complaint has been that an already integrated Judicial Service that had come into existence in the State of Kerala prior to February 12, 1973 as a result of several Government Orders, Statutory Directions and Rules issued under Article 234 and 237 of the Constitution from

time to time, has been disintegrated by the State under the two Government Orders dated February 12, 1973 and September 18, 1973 at Exhs. P1 and P2 respectively by putting all the Magisterial posts alone into one category for a separate avenue of promotion, leaving the Officers and posts of Civil Judiciary to carve out a different channel of promotion, which bifurcation or classification would be irrational, discriminatory and violative of Article 14 and 16 of the Constitution. The main thrust of the petitioner's arguments has been that the singling out of certain posts (Magisterial posts) from such integrated service for a separate avenue of promotion is discriminatory. The argument of hostile or unfavourable treatment to officers and posts on the Civil Side of the Judicial Service is based on the fact that the option to go over to the Criminal Wing as contained in para 3(i) of Exh. P1 is confined or stricted to only those officers who were "originally borne on the Magistracy". The basic postulate made by the petitioner while advancing these criticisms against the Government Orders Exhs. P1 and P2 is that Prior to February 12, 1973 a complete integrated Judicial Service had come into existence in the State of Kerala in which the posts of District Magistrates and Sub-Divisional Magistrates on the Criminal Side had been integrated with those of Sub-Judges and Munsiffs on the Civil Side respectively which postulate is strenuously disputed by the appellants before us. It is obvious that unless a complete integrated Judicial Service in the manner suggested by the petitioner had come into existence in the State of Kerala there would be no question of invoking the concept of hostile discrimination under Articles 14 or 16 of the Constitution, for, it is well settled that a question of denial of equal treatment or opportunity can arise only as between members of the same class. In other words, Article 14 or Article 16 will not be attracted at all unless persons who are favourably treated form part of the same class as those who receive unfavourable treatment. Therefore, in our view, the principal question that arises for our determination in these appeals is whether, prior to the introduction of scheme of bifurcation as contained in Exhs. P1 and P2, as a result of several Government Orders, Statutory Direction and Rules, issued under Article 234 and 237 of the Constitution from time to time, there had come into existence one complete integrated Judicial Service in the State of Kerala or not ? In other words, had there been an integrator of the posts of District Magistrates and Sub-Divisional Magistrates with those of Sub-Judges and Munsiffs as contended by the original petitioner ? The conclusion of the High Court that the posts of District Magistrates and Sub-Divisional Magistrates had been integrated with those of the Sub-Judges and Munsiff's in Kerala is based on the following material : (a) Instructions contained in G.O. MS 851/PUB/ (Integration) dated September 24, 1959; (b) Rules under Article 234 as contained in G.O. MS 850 dated September 24, 1959; (c) Ad hoc Rules for absorption of T.C. Criminal Judicial Officers under Article 234 read with Article 309 dated February 2, 1966 and (d) Kerala State Judicial Service Rules (Special Rules) dated October 5, 1599, and according to the High Court the cumulative effect of the said material was that a complete integrated Judicial Service for the State could be said to have had come into existence. The High Court derived support for its said conclusion from a Full Bench decision of that very Court in P. S. Menon's (P. S. Menon v. State of Kerala, Air 1970 Ker 165 : ILR (1969) 2 Ker 391 : 1970 Lab IC 957) case, where the Full Bench is said to have understood the 1959 Rules and the 1966 Rules as being meant to absorbed the personnel occupying the posts of District Magistrates and Sub-Divisional Magistrates into Civil Judiciary by inducting them into that service. The question is whether on the aforesaid material an inference can be drawn that there had come into existence a real and complete integrated Judicial Service in the State of Kerala in the sense that the posts of District Magistrates and Sub-Divisional Magistrates on the Criminal Side had got integrated with those of Sub-Judges and Munsiffs on the Civil Side.

8. At the outset it may be stated that the State of Kerala comprising the Malabar areas of the former Madras State and the former State of Travancore-Cochin was formed under the States

Reorganisation Act, 1956 with effect from November I, 1956. Prior to such formation of the new State of Kerala steps for separating the Criminal Judiciary from the executive in deference to the Directive Principle of State Policy contained in Article 50 of the Constitution had already been taken in the State of Madras from April 1952 and in Travancore-Cochin from May 1955, but we are not concerned in this case with the several steps so taken in that direction in the States. It may also be stated that prior to the formation of the formation of the new State of Kerala, as far as the Travancore-Cochin area was concerned, there were in operation the Travancore-Cochin Judicial Service Recruitment of Munsiffs Rules 1953, which had been issued under Articles 234 and 238 of the Constitution, Rule 2 whereof specified the qualifications for recruitment as Munsiffs, under which the original petitioner was recruited as a Munsiff in June, 1958; it is not necessary to refer to these Rules in detail but it will be enough to notice that these Rules did not specify Magistrates either as a feeder category or a category for recruitment. As result of the formation of the new State of Kerala steps in the direction of integration of Judicial personnel and posts obtaining in the Malabar area of the former State of Madras and the State of Travancore-Cochin were required to be taken and several instructions, orders and rules in the matter of equation of posts based on functional parity with reference to nature, power and responsibility of the post, inter se seniority, promotion etc, were required to be issued from time to time, but these, it must be observed, will have to be viewed in proper perspective and context of integration of services of the two integrating units and that these has very little to do with the type of integration with which we are concerned in the case, namely, integration of all the Magisterial posts on the Criminal Side with those on the Civil Side. With this background in mind we will now deal with the material on the basis of which the High Court has recorded its finding that prior to February 12, 1973 there was complete integration of the Magisterial posts with those on the Civil Side in Kerala State. We may observe at once that the first three items at (a), (b) and (c) above, really pertain to instructions of orders or rules issued by the Governor of Kerala in the context of integration of Judicial posts and Judicial personnel drawn from the two integrated units, namely, Malabar Branch and Travancore-Cochin Branch. The G. O. MS 851 dated September 24, 1959, [being item(a) as its heading indicates] deals with revision or modification of previous orders issued by the Governor of Kerala in the matter of integration of services and equation of posts - former Travancore-Cochin personnel and those allotted from Madras Judicial Department. After referring to the previous orders whereunder the posts of District Magistrates and Sub-Divisional Magistrates Grades I and II of the Travancore-Cochin Branch had been grouped with the posts of Additional District and Sessions Judges and Sub-Judges and Munsiffs respectively of the same branch and had been equated with the posts of Sub-Judges and District Munsiffs and Sub-Divisional Magistrates respectively of the Madras Branch for the purposes of integration of the officers holding these posts on November 1, 1956 and after referring to the High Court's view that it would not be proper to equate the District Magistrates and the Sub-Divisional Magistrates Grades I and II of Executive origin belonging to the T.C. Branch with the Civil Judicial Officers and that the two should become separate until the Magisterial Officers are included into the Civil Judiciary in the manner prescribed under Article 234 of the Constitution, the G.O. proceeds to state that the Government had reviewed the matter and were pleased to accept the advice of the High Court. The G.O. further proceeds to direct that the District Magistrates and the Sub-Divisional Magistrates I and II grades of the T.C. Branch will not be integrated with the Judicial Officers on November 1, 1956 or promoted to posts in the Civil Judiciary and accordingly, the earlier G.O. dated May 27, 1958, regarding the equation of posts in the Judicial Department shall stand modified to that extent. It appears that while modifying or revising the earlier equation of posts it became necessary to make a provision in regard to the three posts of District Magistrates and eight posts of Sub-Divisional Magistrates by constituting them as a separate service outside the Civil Judiciary enabling the then incumbents of those posts to continue in these posts and, therefore,

in paragraph 2 of the said G.O. it was provided that these three posts of the District Magistrates and eight posts of the Sub-Divisional Magistrates will constitute a separate service outside the Civil Judiciary and will taper off to eventual extinction and that the existing incumbents will vacate the posts either on retirement or by promotion or otherwise by absorption in the Civil Judiciary. Paragraph 3 of this G.O. provided that such among the District Magistrates and Sub-Divisional Magistrates of the T.C. Branch as may be found by the High Court as suitable, will be taken to the Civil Judiciary as and when opportunities occur and in order to enable the High Court to do this, the necessary rules under Article 234 of the Constitution were being issued separately. Simultaneously with the issuance of the said G.O., another order being G.O. MS 850 dated September 24, 1959 [being item(b) above] was issued by way of a Notification which contained the Rules under Article 234 of the Constitution framed by the Governor of Kerala after consultation with the Kerala Public Service Commission and the High Court of Kerala. These Rules again, as their heading clearly suggests, deal with induction of Magisterial Officers of Executive origin of Travancore-Cochin branch into the Civil Judiciary. By Rule I it was provided that the Salaried Magisterial Officers of the former Travancore-Cochin State of two categories i.e. District Magistrates and Sub-Divisional Magistrates grades I and II shall be eligible for appointment to the two categories of Civil Judicial posts i.e. to Sub-Judges and Munsiffs respectively, provided the said officers possessed a degree in Law of a University in India or were Barristers-at-Law. Rule 2 provided for a probationary period while under Rule 3 these Rules became effective immediately. Placing reliance on paragraphs 2 and 3 of G.O. MS 851 dated September 24, 1959 and the Rules mentioned in G.O. MS 850 dated September 24, 1959, the High Court has observed that induction of District Magistrates and Sub-Divisional Magistrates into Civil Judiciary was contemplated by the State Government as per paragraphs 2 and 3 of G.O. MS 851 and the said Rules in G.O. MS 850 recognised the position that the District Magistrates and Sub-Divisional Magistrates were eligible for appointment in the Civil Judiciary. In our view paragraphs 2 and 3 of G.O. MS 851 and the Rules in G.O. MS 850 cannot be read as leading to the inference that there was a general integration of all the posts of District Magistrates and Sub-Divisional Magistrates on the Criminal Side with those of Sub-Judges and Munsiffs on the Civil Side in the entire State of Kerala. In the first place, both these Government Orders Nos. 851 and 850 must be understood in the context of the background in which they were issued, namely, in the context of integration of services and equation of posts of Judicial Officers drawn from two integrating units; secondly, the equation of certain posts done under earlier orders was modified or revised and while so modifying of revising the earlier equation a provision was required to be made in regard to the three posts of the District Magistrates and eight posts of Sub-Divisional Magistrates which were constituted into a separate service outside Civil Judiciary with a view to taper them off to eventual extinction and a provision to continue the then incumbents thereof in their posts till then was also required to be made and in those circumstances it was provided that those incumbents will continue in their posts until the posts were vacated by retirement or promotion or absorption into Civil Judiciary and a further provision was made that only such incumbents from among the District Magistrates and the Sub-Divisional Magistrates of the T.C. Branch as may be found to be suitable by the High Court may be taken into Civil Judiciary as and when opportunities will occur and the Rules in G.O. MS 850 were made merely to enables the High Court to do so. In other words, the absorption of the District Magistrates and Sub-Divisional Magistrates of the T.C. Branch into Civil Judiciary was confined to only a limited number from amongst the then incumbents of the three posts of District Magistrates and eight posts of Sub-Divisional Magistrates (who were constituted into a separate service), who may be found suitable for that purpose by the High Court. It cannot, therefore, be said that there was a general integration of posts on the magisterial Side with those on the Civil Side in the entire State of Kerala as suggested by the petitioner. The next item relied upon by the High Court is item(c), being the Ad

hoc Rules dated February 11, 1966, framed by the Governor of Kerala after consultation with the Kerala Public Service Commission and the High Court of Kerala, which is closely connected with the material at items (a) and (b) which we have discussed above. These Ad hoc Rules were expressly framed "for the absorption of Criminal Judicial officers of the T.C. Branch belonging to the separate service constituted under G.O. MS 850/851/59 Public (Integration) Dept, dated September 24, 1959 and G.O. MS 594/61/Public (Integration) dated July 24, 1961, to the Kerala State Judicial Service"; in other words, whatever provision had been made in these Rules, which had been styled as Ad hoc Rules, was merely for the purpose of absorption of such of the Criminal Judicial Officers of the T.C. Branch who were constituted into a separate service outside Civil Judiciary under G.O. MS 850 and G. O. MS 851 both dated September 24, 1959 as would be found to be suitable by the High Court for inducting into Civil Judiciary. It is thus clear that these Ad hoc Rules had a limited operation and these cannot lead to the inference that there was a general integration of posts on the Magisterial Side with those on the Civil Side in the entire State of Kerala any more than the two G.Os. MS 850 and MS 851 can do.

9. The last item at (d) on which reliance has been placed is the Kerala State Judicial Service Rules (Special Rules) dated October 5, 1966. These Special Rules have been framed by the Governor of Kerala in respect of the members of the Kerala Judicial Service in exercise of the powers conferred under Article 234 and 235 and the proviso to Article 309 of the Constitution and in suppression of all existing rules and regulations on the subject. Rules 5,6 and 20 are the material Rules having a bearing on the question at issue. Rule 5 which deals with the constitution of the service states that the service shall consist of officers bilging to two categories, namely, Category-1 : Sub-ordinate Judges which term shall include Subordinate Judges posted as District Magistrates (Judicial) and Category-II : Munsiffs which term shall include Munsiffs posted as Sub-Divisional Magistrates. Rule 6 deals with the method of appointment to be aforesaid two categories and the sources of recruitment for each. As regards Subordinate Judges (Category-I) it provides that appointment to this category will be by promotion from Munsiffs for which a select list shall be prepared from among the eligible Munsiffs on the basis of merit and ability, Seniority being considered only where merit and ability are approximately equal. As regards Munsiffs (Category-II), it provides that appointment shall be made either (1) by direct recruitment from Bar(2/3rds) or (2) by transfer (1/3rd) from three named categories including Additional First Class Magistrates and Sub-Magistrates. Rule 20 provides that posting and transfer of the members of the service shall be made by the High Court and the Note below Rule 20 states that the appointment and posting of any members of Category-I or Category-II as District Magistrate of Sub-Divisional Magistrate, as the case may be, shall be made by Government under Sections 10,12 and 13 of the Criminal Procedure Code. Strong reliance was placed on behalf of the original petitioner on the aspect that Rule 5 while setting out the two categories of the service, defines the expression Subordinate Judges as 'including a Subordinate Judge, who has been posted as a District Magistrate' and Munsiffs as 'including a Munsiff posted as a Sub-Divisional Magistrate' and on the further aspect that under Rule 6 Additional First Class Magistrates and Sub-magistrates could be appointed as Munsiffs and according to the petitioner these two aspects that emerge from Rules 5 and 6 clearly show that there was an integration of the posts of District Magistrates (Judicial) and the Sub-Divisional Magistrates with those of Sub-Judges and Munsiffs respectively. It is not possible to accept this contention, for, in our view the manner in which the two categories of the service have been described in Rule 5 and the manner in which the various sources of recruitment to each of the categories of service have been provided for in Rule 6 rather show that the original status of Subordinate Judges and Munsiffs as officers belonging to the Civil Side of the Judiciary has been distinctly retained. The very fact that the expression "Subordinate Judges" is said to include a Subordinate Judge posted as District

Magistrate and that the expression "Munsiffs" is said to include Munsiffs posted as Sub-Divisional Magistrates, clearly shows that the Rule-making authority intended that notwithstanding that these officers may be posted as District Magistrate (Judicial) or Sub-Divisional Magistrates, they would be retaining their status as Judicial officers on the Civil Side. As regards Rule 6, we may point out that if Additional first Class Magistrates and Sub-Magistrates were the only sources of recruitment to the posts of Muniffs while making appointment by transfer, there would have been some force in the contention urged on behalf of the petitioner but that is not so; the recruitment by transfer can be made from three sources, namely, (1) Assistant Registrar, Superintendents and Librarian of the High Court and Sheristadars of District Courts; (2) Additional First Class Magistrates, Sub-Magistrates and Assistant Public Prosecutors Grade I and (3) Superintendents of the Law Department of the Government Secretariat and Manager, Office of the Advocate General. In other words, additional First Class Magistrates and Sub-Magistrates constitute one such source of recruitment. The Note below Rule 20 is merely an enabling provision which enables the Government to post any member of Category-I as District Magistrate and any member of Category-II as Sub-Divisional Magistrate under Sections 10, 12 and 13 of the Criminal Procedure Code. In our view, therefore, the Kerala State Judicial Service Rules (Special Rules) dated October 5, 1966 do not at all show that there was or has been any integration of the District Magistrates and Sub-Divisional Magistrates with those of Sub-Judges and Munsiffs respectively as suggested by the petitioner. An analysis of the 1959 Rules under G.O. MS 851 together with the 1966 Ad hoc Rules will show that at the highest a partial absorption of a limited number from out of the then incumbents of the eleven posts (three of the District Magistrates and eight of the Sub-Divisional Magistrates, who were constituted into a separate service outside Civil Judiciary) who were to be found suitable by the High Court into Civil Judiciary, could be said to have occurred under the said Rules, while under the Kerala State Judicial Service Special Rules dated October 5, 1966 a practice of posting seniormost Sub-Judges and Munsiffs as District Magistrates and Sub-Divisional Magistrates respectively grew though these Judicial Officers continued to retain their character as Sub-Judges and Munsiffs in the Civil Judiciary; but experience showed that this practice needed a revision with a view to achieve better administration of Criminal justice and it was in deference to the considered view of the High Court that the State Government ultimately took a decision to bifurcate and constitute two Wings of the Judicial Service, namely, Civil Wing and Criminal Wing and passed the orders at Exhs. P1 and P2 respectively and framed the necessary Statutory Rules (Annexures III and IV), governing the recruitment and conditions of services of the said two Wings, In our view none of the materials on which reliance has been placed by the High Court can lead to the inference that there has come into existence a real and complete integrated Judicial Service in the entire State of Kerala in the sense that all the Magisterial posts on the Criminal Side (District Magistrates and Sub-Divisional Magistrates) had got integrated with those of Sub-Judges and Munsiffs respectively on the Civil Side. It is thus not possible to accept the High Court's finding in this behalf.

10. It may be stated that by way of deriving support for its finding that there has come into existence a complete integrated Judicial Service in the State of Kerala prior to February 12, 1973, the High Court has pointed out that in a Full Bench decision of that Court in P.S. Menon's case (supra), the Full Bench has in connection with the 1959 Rules (Rules in G.O. MS 851 dated September 24, 1959) observed that the said Rules had framed for the absorption of the personnel, who were occupying the posts of District Magistrates and Sub-Divisional Magistrates into the Civil Judiciary. The High Court has further pointed out that when P. S. Menon's case was carried to the Supreme Court in appeal, even this Court in its judgement has referred to the ad hoc Rules framed on February 11, 1966 as being meant for absorption of the Criminal Side Judicial Officers of the Travancore-Cochin Branch who were kept in the separate cadre into Civil Judiciary. The

observations of the Kerala High Court in the Full Bench decision in connection with the 1959 Rules in G.O. MS 851 and of this Court in connection with the 1966 Ad hoc Rules are obviously correct, but, as discussed earlier, both these Rules had a limited operation effecting a partial absorption of such of the incumbents of the eleven posts which were kept in a separate cadre who were to be found suitable by the High Court into Civil Judiciary; but from this fact it is impossible to draw the inference that there had come into existence a complete integrated Judicial Service in the entire State of Kerala in the sense that all posts on the Magisterial Side has got integrated with those on the Civil Side. On the other hand the very fact that there have been in operation three separate sets of Rules, 1961 (dealing only with District and Sessions Judges); (2) the Kerala Subordinate Magisterial Judicial Service Rules, 1962 and (3) the Kerala State Judicial Service Rules (Special Rules) of October 5, 1966, shows that there was no integration of the Judicial Magisterial posts with Judicial Civil posts. If that be so, there will be no question of singling out of certain posts from any integrated service for a separate avenue of promotion under Exhs. P1 and P2 respectively as contended for by the petitioner and the scheme of bifurcation as contained in Exhs. P1 and P2 cannot be regarded as being violative of either Article 14 or Article 16. In this view of the matter it is unnecessary for us to deal with the decision of this Court in State of Mysore v. Krishna Murthy (supra), on which reliance was placed by counsel for the original petitioner, for, the ratio of that decision would be inapplicable to the instant case. In that case on an examination of the Mysore State Accounts Services' Cadre and Recruitment Rules, 1959, the High Court had come to the conclusion, which was accepted by this Court, that there was a clear and complete integration brought about between the P.W.D. Accounts unit and the Loca Fund Audit unit under the common administrative control of the Controller of State Accounts, the qualifications and status of the officers of the formerly separate units being identical, their work being of the same nature, the recruiting authorities being the same and the standards observed and tests prescribed for entry into the formerly separate units being identical and as such the impugned Notifications which resulted in a striking disparity in the promotional opportunities between the officers of the two wings in the same category were struck down. In the instant case before us, we are clearly of the view that prior to the introduction of the scheme of bifurcation as per Exhs. P1 and P2 a complete integrated Judicial Service in the State of Kerala in the sense that all Magisterial posts on the Criminal Side (all District Magistrates and Sub-Divisional Magistrates) had got integrated with the posts of Sub-Judges and Munsiffs on the Civil Side, had not come into existence and, therefore, in the absence of such a complete integrated Judicial Service having come into existence, it was open to the State Government to bifurcate the service into two Wings - Civil and Criminal - in the manner done under Exhs. P1 and P2 respectively and to provide for a particular type of option specified therein and no violation of Articles 14 and 16 is involved.

11. Alternatively, proceeding on the assumption that a complete integrated Judicial Service has come into existence in the State of Kerala prior to the introduction of the scheme of bifurcation under Exhs. P1 and P2 as found by out learned brother Shri Justice Shinghal, the question that arises for our determination is whether the scheme of bifurcation as contained in the said impugned orders with the option indicated therein and the two sets of Rules framed for constituting the two wings violate Article 14 or Article 16 of the Constitution. As pointed out earlier, the Rules do not themselves provide for the option and are free from any blemish of discrimination but the hostile discrimination complained of centers round the option that is specified in the impugned Order Exh. P1. The relevant provision of the impugned order is to be found in para 3(i) which runs thus :

> 3(i) - Option will be allowed to all Civil Judicial Officers originally borne on the Magistracy, irrespective of whether or not they have been confirmed as full members of the Kerala State Judicial Service.

It is pointed out that the aforesaid provision classifies all Civil Judicial Officers of an integrated service into two groups, those who were "originally borne on the Magistracy" and those who were not so borne and the option to go over to the Criminal Wing of the Judiciary with chances of promotion upto District Magistrates is confined only to the Officers belonging to the former group and it has been urged that the scheme of bifurcation containing such restricted option is discriminatory as opportunity to exercise similar option has been denied to the officers belonging to the other group. On the other hand, it was contended by Mr. Lal Narain Sinha, counsel for the State of Kerala, that the question whether the option specified in para 3(1) of Exh. P1 was so confined as has been suggested by counsel for the original petitioner would depend upon the proper construction of the words" originally borne on the Magistracy" occurring in the said provision. According to him the expression 'originally' can be constructed as meaning "before or just prior to the scheme" and so constructed the phrase "originally borne on the Magistracy" would mean that he option was intended for the benefit of all these officers who were borne on the Magistracy and worked as Magistrates at any time but before the scheme was put into operation, with the result that the hostile treatment as suggested by the counsel for the original petitioner would disappear. He pointed out that having regard to the object for which the scheme of bifurcation had been recommended by the High Court, namely, 'to secure better administration of justice on the Criminal Side', the phrase "originally borne on the Magistracy" must have been used with the intention of benefiting all Civil Judicial Officers who had experience on the Criminal Side at some time or the other prior to the introduction of the scheme. In out view, the phrase "originally borne on the Magistracy" occurring in para 3(i) is capable of bearing two constructions - one suggested on behalf of the original petitioner and the other suggested by Mr. Sinha for the State and it is obvious that since the construction suggested by counsel for the original petitioner would lead to unconstitutionally the other construction which renders the provision free of the vice of discrimination under Article 14 or Article 16 will have to be preferred. There is ample authority of this Court for the proposition that where two constructions are possible that one which leads to unconstitutionally must be avoided and the other which tends to make provision constitutional should be adopted, even if straining of language is necessary. Moreover, the construction suggested by Mr. Sinha is in accord with the objection with which the scheme of bifurcation was recommended by the High Court. In the circumstances, we construe the phrase" originally borne on the Magistracy" in para 3(i) of Exh. P1 accordingly and hold that the option contained therein was and is intended for the benefit of all those officers who were borne on the Magistracy and had worked as Magistrates at any time before or just prior to the scheme being put into operation and we have no doubt that the State of Kerala will give the benefit of the option in the manner indicated. Having regard to the aforesaid construction which we are placing on the phrase "originally borne on the Magistracy" occurring in para 3(i) of Exh. P1 it is clear that the complaint of hostile treatment is devoid of any substance and that Exhs. P1 and P2, therefore, do not violate either Article 14 or Article 16 of the Constitution.

12. In the result the appeals are allowed and the judgment and order dated February 8, 1974 of the High Court in O.P. No. 3639 of 1973 is set aside. In the circumstances there will be no order as to costs.

SHINGHAL, J. (partly dissenting) -

These appeals by special leave are directed against the judgement of the Kerala High Court dated February 8, 1974. Appeal No. 2047 has been filed by the State of Kerala, while appeal No. 2048 has been filed by S. Sukumaran Nair and O. J. Antony who were initially appointed as Magistrates in the Service of the Travancore-Cochin and Kerala States respectively. The appellants feel aggrieved because the High Court has allowed the writ petition of M. K. Krishnan Nair (a Subordinate Judge) and "struck down in their entirety" the government orders Ex. P1 (dated February 12, 1973) and Exh. P2 (dated September 18, 1973), the Kerala Civil Judicial Service Rules, 1973, and the Kerala Criminal Judicial Service Rules, 1973.

14. M. K. Krishnan Nair (the writ petitioner) was appointed as a Munsiff in the Kerala Judicial Service on June 10, 1958. He was confirmed with effect from April 1, 1970 when he was serving as a Munsiff. He served as Sub-Divisional Magistrate. Alwaye, and held additional charge as District Magistrate for a few days. He was thereafter posted as a Munsiff. He was promoted as a Sub-Judge on October 3, 1968 and confirmed on that post. He felt aggrieved because of the issue of the State Government's Order Ex, P1 dated February 12, 1973 for the constitution of separate wings for the civil and criminal judiciary consisting of Sub-Judges and Munsiffs on the civil side, and District Magistrates (Judicial), Sub-Divisional Magistrates, Additional First Class Magistrates and Sub-Magistrates on the criminal side, which came to be known as the Kerala Civil Judicial Service and the Kerala Criminal Judicial Service. The real grievance of the writ petitioner was that the State Government has allowed an option to go over to the criminal wing to those officers only who were originally borne on the magistracy and not to him as he did not fulfill that qualification. It was his contention that several officers who were junior to him in the judicial service, but were originally recruited as Magistrates, were unduly benefited and were being posted as District Magistrates (Judicial). The writ petitioner therefore challenged the government order Ex. P1, and the other order Ex. P2 dated September 18, 1973 accepting some of the options, as illegal, discriminatory, and unfair to those who, like him, were borne on the civil judiciary. The respondent State, Sukumaran Nair respondent No. 3, and O. J. Antony respondent No. 4 traversed the claim of the writ petitioner. As has been stated, the High Court has allowed the writ petition, and that has given rise to the two appeals.

15. The controversy in these appeals thus relates to the validity of the aforesaid orders and the Kerala Civil Judicial Service Rules 1973 which were soon after. It will however be necessary to make a brief mention of the relevant facts in a chronological order so that the controversy may be appreciated in its proper perspective.

16. Recruitment of Munsiffs in the erstwhile Travancore-Cochin State, which ultimately merged in the Kerala State, was governed by the Travancore-Cochin Munsiffs Recruitment Rules, 1953. The Kerala State was formed on November 1, 1956 and it comprised the Travancore-Cochin State (excluding the area which was transferred to the Madras State), the Malabar district (excluding a small portion thereof) and the Kasaragod taluk of South Kanara district. The Travancore-Cochin Rules were then replaced by the Kerala Judicial Service (Recruitment of Munsiffs) Rules, 1957, which were made by suitable amending those Rules. The problem of integrating the services of the judicial officers had to be tackled, and the State Government issued G.O. No. 9585/SI./5-57/P.D. dated May 27, 1958 for that purpose which, inter alia, provided the basis for the equation of posts of the Travancore-Cochine and Madras States. The equation dealt with all categories of posts, namely, District Judges (Grades I and II), District Magistrates, Additional District and Sessions Judges, Sub-Judges, Sub-Divisional Magistrates Grade I, Munsiffs and Sub-Divisional Magistrates Grade II,

District and Sub-Magistrates. G.O. MS 850 of September 24, 1959 partially amended the Kerala Judicial Service (Recruitment of Munsiffs) Rules so as to make those District Magistrates and Sub-Divisional Magistrates Grades I and II eligible for appointment as Sub-Judges and Munsiffs who possessed a degree in law of a University in India or were Barristers-at-Law. At the same time G.O. MS 851/Pub (Integration) of September 24, 1959 was issued, at the instance of the High Court, which partially modified G.O. No. 9585 dated May, 1958 in regard to the equation of posts and reserved 3(4?) posts of District Magistrates and 8 posts of Sub-Divisional Magistrates for constituting them into a separate service outside the Civil Judiciary so that the incumbents might continue on those posts. It was however specifically provided that those posts (outside the Civil Judiciary) would cease to exist when those incumbents vacated them be retirement or promotion or otherwise and suitable civil judicial posts were created in their place where necessary. It was also directed that those District Magistrates and Sub-Divisional Magistrates (of the Travancore-Cochin) Branch who were found suitable by the High Court would be taken in the Civil Judiciary as and when possible.

17. Special rules were also made for the Kerala State Higher Judicial Service by a notification dated July 11, 1961.

18. Notification No. G.O.(M.S.)718 dated December 16, 1961 was issued applying the provisions of Articles 234 and 235 of the Constitution, with effect from November 1, 1956, to all classes of Judicial Magistrates of the State as they applied to persons appointed to the Judicial Service of the State.

19. That was followed by the Kerala Subordinate Magistrate Service Rules, 1962. Those Rules provided for the constitution of a separate service consisting only of Additional First Class Magistrates and Sub-Magistrates.

20. It was however still necessary to complete the process of integration of the services of the judicial officers in the Kerala State Judicial Service. Notification No. 3870/3/66 Home dated February 11, 1966 was therefore issued under Article 234 read with the proviso to Article 309 of the Constitution, making ad hoc rules for the absorption of criminal judicial officers of the Travancore-Cochin Branch belonging to the Separate Service constituted under the aforesaid G.O.MS 850/851/59 of the Public (Integration) Department dated September 24, 1959 and G.O. MS 594/61 Public (Integration) Department dated July 24, 1961 to the Kerala State Judicial Service. It was expressly provided by those rules that the Magisterial Officers of the former Travancore-Cochin State holding posts of District Magistrate shall be eligible for appointment shall be eligible for appointment as Subordinate judges and those holding posts of Sub-Divisional Magistrate shall be eligible for appointment as Munsiffs in the Kerala State Judicial Service if they were graduates-in-law of a University in India or were Barristers-at-Law. It was provided in rule (iii) that the persons so appointed will thereupon "become members of the Kerala State Judicial Services and will in all matters including probation, discharge, full membership and promotion be governed by (those) Rules". Provision was also made for their appointment as District Judges or Subordinate Judges and for determining their seniority in the integrated service.

21. Then came the notification G.O.(P)No. 368/66/Home dated October 5, 1966 by which special rules were made under Articles 234, 235 and the proviso to Article 309 of the Constitution. Those Rules were called the Kerala State Judicial Service Rules, 1966. They provided for two categories of officers, namely, Subordinate Judges [which term was to include Subordinate Judges posted as District Magistrates (Judicial)] and Munsiffs (which term was to include Munsiffs posted as Sub-

Divisional Magistrates). It was expressly provided that Additional First Class Magistrates and Sub-Magistrates would be eligible for appointment as Munsiffs by transfer.

22. It would thus appear that the above mentioned Rules and Orders made full provision for the integration of all categories of Judicial Officers in the service or services of the Kerala State. The Kerala Judicial Service (Recruitment of Munsiffs) Rules, the Kerala State Higher Judicial Service Rules and the Kerala Subordinate Magisterial Service Rules covered all categories of posts and officers. So even if it were assumed that the case of any individual officer remained to be finalised for purposes of his appointment or the fixation of his seniority or pay etc. in the integrated set up, that could not possibly justify the argument that the process of integration remained incomplete. I have therefore no doubt that the fiding of the High Court that there was integration of the posts which are the subject-matter of the present controversy, is correct, and does not call for interference. It was in fact expressly conceded by Mr. Lal Narain Sinha on behalf of the State of Kerala that this was really so. Counsel for the other side was not able to advance any satisfactory argument how, in face of the above-mentioned government orders and Rules, it could be said that the work of integration had not been completed.

23. The High Court has however struck down the aforesaid orders Exhs. P1 and P2 and the two sets or Rules of 1973 for two reasons, -

> (i) The formation of the civil and criminal wings out of the integrated service and carving out of separate promotional avenues for the Magistrate officers was discriminatory and irrational.
>
> (ii) The restriction of the exercise of the option to get into the criminal judiciary only to officers borne (originally) on the Magistracy was also discriminatory and irrational.

I shall therefore proceed to examine these reasons but before doing so it may as well be mentioned that the High Court has not really dealt with the two points separately, or as one different from or independent of the other, but has examined them together, mainly with reference to the validity of the order confining the option to those officers who were originally borne on the magistracy. In reaching that conclusion the High Court had drawn on the arguments were advanced before it will reference Article 14 and 16 of the Constitution.

24. What G.O.MS 24/73 Home dated February 12, 1973 (Exh. P1) conveys is the fact that the question of constituting separate wing for the "criminal judiciary" and the "civil judiciary" for the "better administration of justice" had been engaging the attention of the government for some time past, that the government had examined the matter in detail and had decided "in consultation with the High Court" to constitute two separate wings for the civil and criminal Judiciary respectively consisting of Sub-Judges and Munsiffs on the Civil Side, and District Magistrates (Judicial), Sub-Divisional Magistrates, Additional First Class Magistrates and Sub-Magistrates on the criminal side. The rest of the order deals with the framing of separate rules for the two services, the exercise of option to go over to the criminal wing (which shall be examined separately), the release of the posts of Sub-Divisional Magistrates for members of that service and the continuance of those who had been appointed as District Magistrate on or before the date of implementation of the "Scheme". There is thus nothing in the order which could be said to impinge on the right to equality guaranteed by Article 14 of the Constitution in so far as the bifurcation of the integrated judicial services into criminal and civil wings is concerned. So also, there is nothing to show that the creation of the two

services denied equality of opportunity in matters of public employment within the meaning of Article 16.

25. The other order Exh. P2 is G.O.MS 157/73/Home dated September 18, 1973. It makes a reference to order Exh. P1 and conveys government's acceptance of the options exercised by the officers thereunder and the release of posts for them. As has been stated, I shall deal with the question of option separately. It may also be mentioned that the question of release of posts has not figured in the arguments before us as it has not been challenged as illegal. Exh. P2 is therefore an order implementing the earlier order Exh. P1 and cannot also be said to be violative of Article 14 or Article 16.

26. It has to be appreciated that there is nothing in the Constitution or any other law to prevent a State from creating one or more State Services, or to divide an existing Service into two or more Service, according to this requirement. In fact Article 309 of the Constitution contemplates the making of Acts or Rules to regulate the recruitment, and conditions of service of persons appointed, to public Services and posts in connection with the affairs of the State. And there is ample evidence in this case to show that even though it was thought, on the formation of Kerala State on November 1, 1956, that the integrated services mentioned above would meet the requirements of the Judicial Services, the High Court felt, later on, that it was necessary to "separate the civil and criminal wings of the Subordinate Judiciary". Reference in this connection may be made to High Court's letters dated March 4, 1970 and May 12, 1970 which go to show that the scheme of bifurcation was bright about at the instance of the High Court "to secure better administration of justice". The High Court, for that purpose, not only sent its detailed proposals, but also its proposals for the Rules to be made for the Constitution of the two services.

27. As has been mentioned, those rules are the Kerala Civil Judicial Services Rules 1973, and the Kerala Criminal Judicial Rules 1973. Both the Rules have been made in suppression of all the rules and regulations which were then in force on the subject-matter of the Rules. The Kerala Civil Judicial Service Rules, 1973 provide, inter alia, for the constitution of the service by Subordinate Judges and Munsiffs, the method of their appointment, recruitment of members of the Scheduled Castes and Tribes, the training of officers selected for appointment as Munsiffs, their minimum qualifications and the period of probation etc. The remaining Rule 18 deals with the matter of "option" of officers to the Kerala Criminal Judicial Service, but that is a matter which will be examined separately. There is thus nothing in the Kerala Civil Judicial Service Rules 1973 which could be said to be discriminatory or violative or Articles 14 and 16 of the Constitution for any reason.

28. Much the same is the position regarding the Kerala Criminal Judicial Service Rules 1973. They also deal with the matters covered by the Kerala Civil Judicial Service except that the service consists of District Magistrates, Sub-Divisional Magistrates, Additional First Class Magistrates and Sub-Magistrates. Rule 18(ii) of the Rules deals with "option ", but that again is a matter which will examined separately. There is otherwise no reason to think that the Rules are invalid for any reason whatsoever.

29. On the question of the Validity of the option given by order Exh. P1 (G.O.MS 24/73/Home dated February 12, 1973) the controversy before us relates to the following portion of paragraph 3(i) -

> 3(i) Option will be allowed to all Civil Judicial Officers originally borne on the

> Magistracy, irrespective of whether or not they have been confirmed as full members of the Kerala State Judicial Service.
>
> It has been urged that when the Services had been integrated, it was discriminatory to treat members of that Service differently in the matter of appointment of the Kerala Criminal Judicial Service. For the same reason, the validity of G.O.MS 157/73/Home (Exh. P2) has been assailed as under it the State Government has accepted the option of the 14 officers mentioned in it.

30. In so far as the Service Rules are concerned, Rule 18 of the Kerala Civil Judicial Service Rules 1973, provides as follows. -

> 18. Transitory Provisions - Notwithstanding anything contained in these rules, the officers whose options to the Kerala Criminal Judicial service have been accepted by Government in G.O. MS 157/73/Home dated September 18, shall be allowed to continue in their present posts in the Kerala Judicial Service till they are given postings in the Kerala Criminal Judicial Service.

The corresponding provision in the Kerala Criminal Judicial Service Rules 1973 to which objection has been taken is Rule 18(ii) which makes a mention of the options of the officers accepted by the Government in G.O.No. MS 157/73/Home dated September 18, 1973 (Exh. P2) and their continuance on their posts in the Kerala Civil Judicial Service till they were given suitable postings in the Kerala Criminal Judicial Service consistent with their original seniority in the criminal wing.

31. The State Government has tried to justify the restriction of the option to go over to the Kerala Criminal Judicial Service on the basis of the past history and the factual position prevailing at the relevant time. Mr. L. N. Sinha, counsel for the State, has urged that the Rules clearly show that promotion of a Subordinate Judge is to the rank of a District Judge and that the fact that sometimes a Subordinate Judge was posted as District Magistrate is not quite pertinent. He has also urged that no Subordinate Judge has any particular right to be posted as District Magistrate and merely the chance of such a posting is not a substantial benefit which could invalidate the Rules. Then it has been pointed out that the statutory Rules do not themselves the Rules. Then it has been pointed out that the statutory Rules do not themselves provide for the option and fare free from any blemish of discrimination.

32. It is however well-settled that while, in form, Article 14 appears to contain an absolute probation, it is not really absolute, for the doctrine of classification has been incorporated in it by judicial decisions : (Makham Lal Malhotra v. The Union of India ((1961) 2 SCR 120 : AIR 1961 SC 392). So it is now no longer in dispute that it is permissible to make a law making a classification if it is founded on an intelligible differential having a rational relation to the object sought to be achieved by it. It may also not be disputed that the classification may be based on the objects to be achieved or, as in Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar ((1959) SCR 279 at p. 297 : AIR 1958 SC 538), it may be founded on the difference between persons or, in a given case, the law may itself provide a policy or principle for the guidance of the exercise of the discretion of the Government in the matter of classification or selection for appointment. It may also be that the differentiation may be upheld if it arised for historical reasons e.g. because of the merge of States : (Bhaiyalal Shukla v. State of Madhya Pradesh ((1962) Supp 2 SCR 257 : AIR 1962 SC 981 : 13 STC 236)). But the question is whether the classification made by the order Exh. P1 in confining the option to "all Civil Judicial Officers originally borne on the Magistracy" is a classification which is

based on an intelligible differential which distinguishes those persons from the others who had been left out of the opinion and the differentia has a rational relation to the object sought to be achieved by the order or the rules giving effect to it ?

33. It has been argued that the classification in favour of only those Civil Judicial Officers who were originally borne on the Magistracy, is an intelligible classification based on an intelligible differentia and that it has the object of providing the Criminal wing of the Judiciary, to be constituted under the Kerala Criminal Judicial Service Rules, 1973, with only those officers who had some experience of criminal or magisterial work. But the argument is not tenable for there could possibly be no reason, even for the purpose of achieving that object, why those Civil Judicial Officers who, though not originally borne on the Magistracy, had acquired sufficient experience of the Magisterial work after their appointment as Magistrate as a result of the intergation of the service after the formation of the Kerala State should have been left out. As is obvious, the classification made by the impugned orders (Exhs. P1 and P2) between those Civil Judicial Officers who were "originally borne on the Magistracy" and those who came over to the Magistracy thereafter, but before the constitution of the so-called criminal wing of the Judiciary, is not a permissible classification and it cannot be said to be correlated to, or to subserve, the object of providing an efficient service to man the posts belonging to the Kerala Criminal Judicial Service.

34. This appears to be the reason why Mr. L. N. Sinha has been fair enough to suggest that the option may not be limited to the officers who were originally appointed as Magistrates but may also be made available to all officers having previous experience as Magistrates. No useful argument has been advanced for a contrary view and it appears that the suggestion of Mr. Sinha deserves to be accepted as it will have the effect of making the provision as to the exercise of the option above challenge. As it is, the offending parts of the impugned orders and Rules which restrict the option of officers originally borne on the Magistracy is severable from the rest of the provisions and the High Court clearly erred in striking the orders and the Rules "in their entirely".

35. It may be menaced in this connection that once it is held that the bifurcation of the integration Service into Civil and Criminal Judicial Service was valid, and there was justification for prescribing the requirement of previous magisterial experience for the constitution of the Criminal Judicial Service of the State, it would not be permissible to challenge it with reference to Article 14 or Article 16 of the Constitution merely on the ground that it carved out "separate promotional avenues for the Magisterial Section of the Judiciary". When a separate Criminal Judicial Service was validly constituted by the two sets of Rules of 1973 and those Rules provided for its composition, qualifications, recruitment, and method of promotion to higher posts, it was only reasonable that they should govern the making of promotions of the members of the Service. In fact it has not been urged in this Court that the provision in the Rules relating to promotion is invalid for any reason and could be said to be discriminatory or irrational. The High Court therefore erred in taking a contrary view.

36. In the result, the appeals are allowed to the extent that while the impugned orders Exhs. P1 and P2 and the Kerala Civil Judicial Service Rules 1973 and the Kerala Criminal Judicial Service Rules 1973 providing for the constitution of the civil and criminal wings of the Kerala State Judiciary are held to be valid, that part of those order and the Rules which relates to the restriction of the option to officers originally borne on the Magistracy is invalid and the High Court's judgment is upheld to that extent. It is however clarified that it will be permissible for the authorities concerned to suitably amend order Exh. P1 and the Rules so as to make the opinion to join the Kerala Criminal Judicial Service available to all those officers who had previous experience of Magisterial work on the date

when those Rules came into force. For this purpose the authorities concerned will no doubt give a fresh opportunity to those officers who will become eligible to exercise the option for joining the Criminal Judicial Service as a result of this judgment. In the circumstances of the case, no order as to the costs in this Court is necessary.

ORDER

37. In view of the majority opinion of this Court the appeals are allowed with no order as to costs.

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