Hari Datt Kainthla and Another

Vs

State of Himachal Pradesh and Others

Civil Appeal No. 991 of 1975

(E. S. Venkataramiah, D. A. Desai JJ)

09.04.1980

JUDGMENT

DESAI, J. –

1. Would Article 16 of the Constitution come to the rescue and be successfully invoked by appellants, admittedly juniors in the gradation list of Subordinate Judges in the State of Himachal Pradesh to Respondents 3, 4 and 5, questioning the legality and validity of their promotion to the cadre of District/Additional District and Sessions Judges ('DSJ/ADSJ' for short), as also questioning the legality and validity of promotion of respondents 6 and 7 to the selection grade post of Subordinate Judge ?

2. Uncontroverted facts are that Himachal Pradesh was a Union Territory till January 25, 1971, when at the apex of juridical hierarchy there was a Court of Judicial Commissioner. On the introduction of the Punjab Reorganization Act, 1966, ('Reorganization Act' for short), effective from November 1, 1966, certain territories were transferred and added to the Union territory of Himachal Pradesh simultaneously extending the jurisdiction of the Court of Judicial Commissioner of Himachal Pradesh to the transferred territories. Consequently, provision was made for allocation of persons belonging to different services in pre-reorganised State of Punjab (respondents 4 to 7 being such allocated officers) to Union Territory of Himachal Pradesh. On May 2, 1967, the Union Territory of Himachal Pradesh was placed under the jurisdiction of Delhi High Court which continued till January 25, 1971, when statehood was conferred on the Union Territory and a full-fledged High Court of Himachal Pradesh was set up.

3. Himachal Pradesh (Courts) Order, 1948 ('1948 Order' for short), was issued by the Union Government in exercise of the powers conferred by Sections 3 and 4 of the Extra Provincial Jurisdiction Act, 1947, and this Order remained in force till it was replaced by the Himachal Pradesh Subordinate Judicial Service Rules, 1962, ('1962 Rules' for short). Para 16(2) of the 1948 Order provided for the appointment of District & Sessions Judges. The Chief Commissioner had power to appoint as many persons as he considered necessary to be District Judges. 1962 Rules appear not to have made any departure in this behalf.

4. Promotional avenue in Himachal Pradesh Subordinate Judicial Service moves vertically from the grass-root entry as Subordinate Judge promotable as Senior Sub-Judge-cum-Assistant Sessions Judge and then the further promotional avenue is DSJ/ADSJ.

5. Both the appellants were working as Senior Sub-Judge-cum-Assistant Sessions Judge and they questioned the validity and legality of promotion of respondents 3, 4 and 5 given on May 18, 1971,

as DSJ/ADSJ on the ground that the post of DSJ/ADSJ is a selection post and the criterion for selection must be merit alone, seniority being treated as thoroughly irrelevant and, therefore, all those who were within the zone of eligibility should have been considered before selecting respondents 3, 4 and 5 and this having not been done, the promotion having been given purely on the basis of seniority, their promotion is invalid. Simultaneously they contended that same criterion would mutatis mutandis apply while giving the promotion to Senior Sub-Judge-cum-Assistant Sessions Judge to selection grade post and that having not been done and the promotion having been given only on the basis of seniority, the same is invalid. In support of the contention reliance has been placed amongst other things on a Memorandum dated June 15, 1957, issued by the Himachal Pradesh Administration. There is a serious controversy whether this memorandum was effective and in force on the date of impugned promotions and whether the same would apply to the case of judicial officers.

6. Appellants impleaded the State of Himachal Pradesh as respondent 1 and the High Court of Himachal Pradesh as respondent 2. Though the High Court would be the most competent to throw light on the vexed question as to by what criterion it selected respondents 3, 4 and 5 for promotion to the post of DSJ/ADSJ and recommended their names for appointment to the Governor, surprisingly the High Court through its Registrar did not appear and participate in the proceedings. Nor did the Bench hearing the matter call for the relevant files from the office to the High Court though a prayer to that effect was made in the writ petition.

7. Respondent 1, State of Himachal Pradesh, filed the return to the writ as per the affidavit of Shri A. K. Gowswani, Joint Secretary to the Government, Department of Personnel, Simla. State Law Department also appears to have scrupulously kept out from the arena of controversy. In the return it was admitted that the appointments to the posts of Subordinate Judges were made in accordance with the provisions of para 18 of the 1948 Order till the 1962 Rules were enacted and brought into force on April 10, 1962. It was averred that the appointment to the post of District Judge used to be made under the provisions of para 16(2) of the 1948 Order which conferred power on the Chief Commissioner after consultation with the Judicial Commissioner to appoint as may persons as he thought necessary to be District Judges. It was further contended that since Himachal Pradesh attained full statehood on January 25, 1971, appointment to the post of DSJ was governed by Article 233 of the Constitution and, therefore, the appointments were to be made by the Governor in consultation with the High Court and accordingly respondents 3, 4 and 5 were promoted and appointed as DSJ/ADSJ on the recommendation of the High Court. The averment to that effect in para 12 of the writ petition was admitted in the return. Identical position was adopted supporting the promotion to selection grade given to respondents 6 and 7.

8. The return leaves no room for doubt that the promotions to the posts of DSJ/ADSJ were given by the Governor on the recommendation made by the High Court to the Governor and the Governor acted upon the recommendation. It was, therefore, absolutely incumbent upon the High Court to have pointed out what criterion it adopted in selecting respondents 3, 4 and 5 for promotion before it went in search of what principle ought to be adopted in selecting persons from Subordinate Judicial Service for promotion to the post of DSJ/ADSJ. There is not even a whimper as to what criterion was adopted by the High Court in formulating its recommendations both the promotion as DSJ/ADSJ and to selection grade in the scale of Subordinate Judge-cum-Assistant Sessions Judge, the latter having been given by the High Court itself evidenced by the notification dated March 19, 1971.

9. Relevant provisions of the Constitution bearing on the question of appointment of District Judges

and control of the High Court over the Subordinate Courts may be noticed. Article 233 read as under :

> Appointment of district judges. - (1) Appointments of persons to be, and the posting and promotion of, district Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.
>
> (2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a District Judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

Article 235 reads as under :

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

10. Article 236 provides that in Chapter VI of Part VI of the Constitution the expression 'district judge' includes a 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. The expression 'judicial service' in the chapter means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of District Judge. Article 309 confers power on the Legislature by appropriate legislation to regulate the recruitment and conditions of service of person appointed to public services and posts in connection with the affairs of the Union or of a State and till such legislation is enacted the power is conferred by the provision Article 309 on the President and the Governor, as the case may be, to make rules in that behalf.

11. At the outset it must be noticed that no Rules appear to have been enacted under Article 309 proviso regulating recruitment and conditions of service of DSJ/ADSJ. Undoubtedly such rules will have to be in conformity with other provisions of the Constitution such as Article 16, and the provisions included in Chapter VI of Part VI of the Constitution. Till such rules are framed appointment to the post of DSJ/ADSJ will have to be made in accordance with the provisions of Articles 233 and 235 of the Constitution.

12. Article 233 confers power on the Governor of the State to appoint persons either by direct recruitment or by promotion from amongst those in the judicial service as district judges but this power is hedged in with the condition that it can be exercised by the Governor in consultation with the High Court. In order to make this consultation meaningful and purposive the Governor has to consult High Court in respect of appointments of each person as District Judge which includes an Additional District Judge and the opinion expresses by the High Court must be given full weight. Article 235 invests control over subordinate courts including the officers manning subordinate

courts as well as the ministerial staff attached to such courts in the High Court. Therefore, when promotion is to be given to the post of district judge from amongst those belonging to subordinate judicial service, the High Court unquestionably will be competent to decide whether a person is fit for promotion and consistent with its decision to recommend or not to recommend such person. The Governor who would be acting on the advice of the minister would hardly be in a position to have intimate knowledge about the quality and qualification of such person for promotion. Similarly when a person is to be directly recruited as district judge from the Bar the reasons for attaching full weight to the opinion of the High Court for its recommendation in case of subordinate judicial service would mutatis mutandis apply because the performance of a member of the Bar is better known to the High Court than the minister or the Governor. In Chandra Mohan v. State of U. P. ((1967) 1 SCR 77, 83 : AIR 1966 SC 1987 : (1967) 2 SCJ 717), a Constitution Bench of this Court observed as under :

> The constitutional mandate is clear. The exercise of the power of appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of District Judge in consultation with the High Court. The object of consultation is apparent. The High Court is excepted to know better than the Governor in regard to the suitability or otherwise of a person, belonging either to the 'judicial service' or to the Bar, to be appointed as a district judge. Therefore, a duty is enjoined on the Governor to make the appointment in consultation with a body which is the appropriate authority to give advice to him.

This view was reaffirmed in Chandramouleshwar Prasad v. Patna High Court ((1970) 2 SCR 666 : (1969) 3 SCC 56 : AIR 1970 SC 370), observing :

> The High Court is the body which is intimately familiar with the efficiency and quality of officers who are fit to be promoted as district judges. The High Court alone knows their merits as also demerits.

13. In A. Panduranga Rao v. State of A. P. ((1976) 1 SCR 620 : (1975) 4 SCC 709 : 1975 SCC (L&S) 407 : AIR 1975 Lab IC 1922), this Court observed that there are two sources of recruitment to the post of District Judge, viz., judicial service in subordinate rank and members of the Bar. In either case the consultation would assume the form of recommendation made by the High Court.

14. It is thus incontrovertible that appointment to the post of DSJ/ADSJ in Himachal Pradesh will have to be made in accordance with the provisions contained in Article 233. If any rules are enacted under Article 309 for regulating recruitment and conditions of service of DSJ/ADSJ, the rules will have to be in conformity with Article 233 and if they violate the constitutional mandate of Article 233 the rules will be held ultra vires as succinctly laid down in Chandra Mohan case ((1967) 1 SCR 77, 83 : AIR 1966 SC 1987 : (1967) 2 SCJ 717). To be precise so as to leave no ambiguity, in that case Rule 13 of the U.P. Higher Judicial Service Rules provided for procedure for selection by promotion to the post district judge from the subordinate judicial service and amongst others, the procedure provided for selection to be made by a committee consisting of two judges of the High Court and the Judicial Secretary to Government. This rule was held to be ultra vires as being violative of Article 233 inasmuch as the High Court could be said to have abdicated its constitutional function of making recommendation to an outside authority not known to Constitution.

15. Turning to the facts of the case, save and except the 1948 Order no rules appear to have been

enacted regulating recruitment and conditions of service of DSJ/ADSJ in Himachal Pradesh. Therefore, appointment to the post of DSJ/ADSJ in Himachal Pradesh will have to be made in conformity with Article 233. Even if para 16(2) of the 1948 Order held the field it merely provided for appointment by the Chief Commissioner (now replaced by the Governor) in consultation with the Judicial Commissioner (now replaced by the High Court). That provision would be in conformity with Article 233. The High Court in this case recommended the names of respondents 3, 4 and 5 for promotion to the post of DSJ/ADSJ as averred by appellants themselves and the Governor accepted the recommendation and the appointments were made consistent with the recommendation. It cannot be gainsaid that this is in conformity with Article 233 and the constitutional mandate is complied with and no statutory rule in the absence of any could be said to have been violated by promotion being given in this manner. In our opinion the matter should have ended there.

16. The High Court, however, completely obliterating from its mind the criterion it must have followed in making the recommendation which prima facie appears to be one of seniority-cum-merit, undertook an exercise of a search of what ought to be the criterion for promotion from the subordinate judicial service to the responsible post of District Judge. The High Court framed the question thus :

> The first question is whether in law appointment to the post of District Judge/Additional District Judge must be made by selection of most meritorious officer upon an appraisal of the comparative merit of eligible subordinate judges or is it sufficient that it is made on the basis of seniority-cum-fitness.

We find it a bit difficult to follow and appreciate how the High Court could proceed on such a fruitless and bizarre enquiry unconnected with and wholly unnecessary in the facts of the case before it. The same High Court on its administrative side must have known its own mind when while making recommendation for promotion, the principle or criterion it adopted. The High Court must be presumably aware even while making recommendation for promotion to the post of DSJ/ADSJ that it was a responsible post and merit alone must guide it in making recommendation. Presumably the full court made the recommendation. The High Court took notice of the fact that there were no rules at the relevant time in Himachal Pradesh formulating the principle or criterion on which such promotion as District Judge was to be recommended. If thus there was no rule and the High Court proceeded to adopt merit-cum-seniority, or seniority-cum-fitness as a criterion for recommending promotions from subordinate Judges to the post of district judge neither of which appears to violate either Article 233 or Article 16 or any other constitutional mandate or any statutory rule, it would be futile to proceed to examine what ought or possible criterion should really govern the decision for recommending persons from subordinate judicial service for promotion to the post of DSJ/ADSJ. If the High Court felt that the post of district judge is a very responsible post and merit alone district judge it was incumbent upon the High Court to propose necessary rules and get them enacted under Article 309. That appears not to have been done. Alternatively, High Court should while making recommendation for promotion put the principle of merit-cum-seniority in the forefront and act accordingly. The High Court and the Governor appear to be agreed that the recommendation for promotion made was proper and the same was accepted without a demur. In our opinion it is then futile to examine what ought to be criterion for such promotion, unless there is no discernible principle on which recommendation can by justified or the recommendation is attached as arbitrary, mala fide or vitiated by bais. There is no such allegation.

17. The High Court after referring to some books on public Administration and public services and

keeping in view the status and responsibility attaching to the post of District Judge, concluded as under :

> I would therefore hold that having regard to the duties and responsibilities attaching to the post of District Judge and the position occupied by the District Judge in the judicial hierarchy, appointment to that post must be made by selection of the most meritorious officer upon an appraisal of the comparative merit of eligible subordinate judges. In my opinion, the principle of seniority-cum-witness would not be a valid principle.

18. It is difficult to appreciate how such a principle can be enunciated in abstract. If for regulating recruitment and conditions of service of district judges it was considered essential by the High Court that promotion to the post of District Judge from the subordinate judicial service shall be on merit alone and seniority having no place in the consideration unless two are considered equally meritorious, it was incumbent upon the High Court to have proposed such a rule to be enacted under Article 309. Neither the High Court nor the government have proposed such rules. And surprisingly, after reaching this conclusion the High Court rejected the writ petition, frankly, on an untenable ground that the petitioners have failed to show that if they had been considered at the time when the impugned promotions were made they would have stood a fair chance of being preferred over respondents 3, 4 and 5. This is an unsustainable conclusion. If the High Court is otherwise right that when promotion is to be given on the criterion of merit alone, all those in the zone of selection or field of eligibility must be simultaneously considered and the best among them should be selected and recommended for promotion. The silence of the High Court on the most important question as to what criterion it adopted while formulating its recommendation coupled with the fact that those at the top of gradation list according to their seniority were recommended is eloquent enough to conclude that principle of seniority-cum-merit was adopted by the High Court. What the High Court s appears to have done is as and when the vacancy occurred the senior most in the cadre of subordinate judges was considered and if found fit was recommended. The present grievance is by persons junior to respondents 3, 4 and 5 whose promotion is questioned and the grievance is that they were not considered along with others eligible. It is impossible to expect a person to aver that if along with others eligible he was considered he would have been selected. Right to be considered for selection is distinct from an assertion that if considered the person so considered would of necessity be selected and then alone his grievance that he was not considered even though eligible could be examined by the court. It is, however, not necessary to dilate on this point because in our opinion as the situation stood at the time of the impugned recommendations for promotion and the consequent appointments made by Governor there was no such rule providing merit alone as the criterion for promotion and the High Court, though it does not reveal its mind, appears to have proceeded on the criterion of seniority-cum-merit which is a valid criterion under Article 16 and not violative of Article 233 and the appellants, therefore, who were junior to respondents 3, 4 and 5, cannot be heard to make a grievance about the promotion of respondents 3, 4 and 5 who as and when their turn came were considered and on being found fit were recommended for promotion and the Governor appointed them.

19. It was, however, said that Office Memorandum No. F. 1/4/55-RPS dated May 16, 1957, issued by the Government of India, Ministry of Home Affairs, was applicable to the services including subordinate judicial service under the Union Territory of Himachal Pradesh before it attained statehood and that even if an office memorandum of the Government of India may not be directly applicable, it appears to have been adopted by the Union Territory of Himachal Pradesh because the same was issued by the Assistant Secretary to the Himachal Pradesh Administration as per his

Memorandum No. Apptt. 1/350/57, dated June 15, 1957, with a request that the contents of the Memorandum may also be brought to the notice of each member of the Departmental Promotion Committee for Class I, II and III posts constituted for each Department under the Union Territory of Himachal Pradesh. This Memorandum appellants say, prescribes guide-lines, and lays down criterion in giving promotions to posts which are styled as 'selection posts' as also to selection grades. Broadly stated, the guide-lines are that appointments to selection posts and selection grade should be made on the basis of merit with regard to seniority only to the extent indicated in the memorandum. If further provided that Departmental Promotion Committee or other selecting authority should first decide the field of choice, i.e., the number of eligible officers awaiting promotion who should be considered for inclusion in the selection list provided, however, that an officer of outstanding merit may be included in the list of eligible candidates even if he is outside the normal field of choice. Field of choice was to be confined to five or six times the number of vacancies expected within a year. It was indicated that those found unfit should be excluded. Even in respect of those who are included in the field of choice each officer should be classified as outstanding, very good, good, on the basis of merit as determined by the respective records of service and thereafter a select list should be drawn up by placing the names in the order of merit as indicated earlier without disturbing the seniority inter se within each cadre. Promotion should thereafter be confined, it was suggested, to the select list and by following the order in which the names are finally arranged. It was considered desirable to periodically revise the select list.

20. Appellants contend that the memorandum laying these guide-lines was issued, no doubt, by the Government of India when Himachal Pradesh was a Union Territory and, therefore, Government of India was competent to issue such directions in respect of services under the Union Territory of Himachal Pradesh but even if there is any doubt, once the same was adopted by Himachal Pradesh Administration, in the absence of any statutory rule it is binding and any promotion made in breach or violation of the prescribed guide-lines would be invalid. There is nothing to show that that office memorandum was endorsed to the High Court and that the Administration suggested that the High Court should adopt it while making recommendations for promotion to the post of DSJ/ADSJ. In the absence of a return by the High Court to the writ petition it is difficult to say whether the Administration desired that the guide-lines prescribed in the memorandum should also be accepted or adopted by the High Court. In the return filed on behalf of the Himachal Pradesh Government it has been stated that the memorandum was received from the Government of India and that the memorandum did contain some guiding principles for appointment to selection posts and selection grade but they were merely directory in nature and were only issued for the sake of guidance implying that if the facts and circumstances of any particular case so warranted, the concerned authority could make deviation therefrom. It was, further stated that after Himahchal Pradesh attained statehood on January 25, 1971, the memorandum ceased to have any force and in the absence of any other statutory rule promotions and appointments to the post of DSJ/ADSJ can only be made in conformity with Article 233 of the Constitution and any other direction to the contrary would be void and of no effect.

21. The High Court disposed of the memorandum by a cryptic observation that there has been a serious debate before the Court on the question whether the direction contained in the aforesaid memorandum had to be complied with by the High Court and the State Government when the impugned appointments were made. After noting this debate the High Court did not proceed to dispose of the contention and did not record a finding whether the memorandum was or was not required to be complied with by the High Court while making recommendations for promotion to the posts of DSJ/ADSJ. In the absence of any material as to whether the memorandum was endorsed to the High Court or whether the High Court adopted or acted upon the same or not it is difficult to

accept that it was binding on the High Court and any recommendation for promotion made in breach or contravention thereof would render the promotion on invalid. Even apart from this, the impugned promotions were made on May 18, 1971, after Himachal Pradesh became a full-fledged State with a High Court at the apex of judiciary and the memorandum would cease to have any force or binding effect.

22. The same memorandum was relied on in support of the contention that in giving promotion to selection grade to respondents 6 and 7 the guide-lines in the memorandum of 1957 were not only not followed but the promotions were made completely overlooking the guide-lines or in contravention of the guide-lines. Reasons for rejecting the efficacy of memorandum in relation to promotion to the post of DSJ/ADSJ will mutatis mutandis apply and the contention will have to be negatived. This contention must also be negatived for the additional reason that promotion from the post of subordinate judge to the selection grade post of subordinate judge is a promotion from one post in subordinate judicial service to another post in the same service. This promotion would definitely be under the control of the High Court as provide in Article 235 of the Constitution. No statutory rule was pointed out as to how such promotion was to be given. In the absence of a statutory rule the High Court would be the sole authority to decide the question of promotion in exercise of its control under Article 235. By Article 235 the High Court has been vested with complete control over the subordinate courts and this exercise of control comprehends the power to decide eligibility for promotion from one post in the subordinate judicial service to higher post in the same service except where one reaches the stage of giving promotion as DSJ/ADSJ when Article 233 would be attracted and the power to give promotion would be in Governor hedged in with the condition that the Governor can act after consultation with the High Court which has been understood to mean on the recommendation of the High Court. But when it comes to promotion in the judicial service under the District Judge the High Court would be the sole authority to decided the question of promotion (see High Court, Calcutta v. Amal Kumar Roy ((1963) 1 SCR 437, 454 : AIR 1962 SC 1704)). This becomes manifestly clear from State of Assam v. Kuseswar Saikia ((1970) 2 SCR 928, 932 : (1969) 3 SCC 505 : AIR 1970 SC 1616). In that case one Upendra Nath Rajkhowa was promoted by the Governor as Additional District Judge purporting to act under Article 233 and a writ of quo warranto was sought challenging the appointment on the ground that the promotion as Additional District Judge could only be made by the High Court acting under Article 235. It was also contended that his further appointment as District Judge by the Governor would be void. It was so held by the High Court. On appeal when the matter came to this Court, analyzing Article 233 this Court held as under : (SCC p. 509, para 6)

It means that appointment as well as promotion of persons to be District Judges is a matter for the Governor in consultation with the High Court and the expression 'District Judge' includes an Additional District Judge and an Additional Sessions Judge. It must be remembered that District Judges may be directly appointed or may be promoted from the subordinate ranks of the judiciary. The Article is intended to take care of both. It concerns initial appointment and initial promotion of persons to be either District Judges or any of the categories included in it. Further, promotion of District Judges is a matter of control of the High Court. What is said of District Judges here applies equally to Additional District Judges and Additional Sessions Judges.

23. This Court accordingly held that the promotion of Rajkhowa as Additional District Judge by the Governor was made under Article 233 and that it was a valid appointment. Accordingly the appeal was allowed. It thus becomes crystal clear that while promotion to the post of District Judge which includes various posts as set out in Article 236, is with the Governor, the High Court alone would be competent to decide the promotion from one post in subordinate judicial service to any higher post

in subordinate judicial service under the District Judge. Appellants contend that promotion of respondent 6 and 7 from the rank of subordinate judge to the selection grade post of subordinate judge is invalid as being in contravention first of the memorandum and secondly such promotion must only be on the basis of merit and not seniority. This contention must fail because no statutory rule is pointed out as to how the promotion was to be given and the High Court having given the promotion it was most competent to do so. The challenge must accordingly fail.

24. Appellants also contended that even if the criterion for recommendation for promotion to the post of DSJ/ADSJ is seniority-cum-merit, respondent 3, 4 and 5 did not deserve to be promoted because their unfitness stares in the face inasmuch as they were not considered suitable for confirmation as subordinate judge as and when their turn came for confirmation and that would show that they were not men of merits. It was pointed out that respondents 4 and 5 were not confirmed due to their unsatisfactory performance in discharge of duties while their colleagues in the same batch were confirmed earlier. It was further pointed out that respondent 4 was not even allowed to cross the efficiency bar for a period of about 10 years and that he was allowed to cross it for the first time in 1970. These averments have hardly any relevance. The power to confirm anyone in the subordinate judicial service vests in the High Court in exercise of the control vested in the High Court under Article 235. In fact the power to promote to various posts in the subordinate judicial service under the District Judge comprehends also the power to confirm and that vests in the High Court. It is not necessary to dilate on this point because it is concluded by a decision of this Court in State of Assam v. S. N. Sen ((1972) 2 SCR 251 : (1971) 2 SCC 889 : AIR 1972 SC 1028), wherein this Court held that under Article 235 of the Constitution 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 promotees is also in the High Court and any rule in conflict with Article 235 must be held to be invalid. This view was affirmed in State of Bihar v. Madan Mohan Prasad ((1976) 3 SCR 110 : (1976) 1 SCC 529 : 1976 SCC (L&S) 103). This Court held that since Article 235 of the Constitution vests the power of confirmation in the High Court, the power of determining the seniority in the service is also with the High Court. Of course, in doing so the High Court is bound to act in conformity with any rules made by the Governor under the provisions of Article 309 of the Constitution, if there be a rule.

25. The administrative side of the High Court have chosen not to participate in the proceedings this Court must dispose of the appeal on the scanty material available on record. On the available material the appellant failed to establish violation of any existing rule, statutory or otherwise, governing promotion of persons to the post of DSJ/ADSJ as there is no such rule. The impugned appointments appear to have been made by promotion of those belonging to subordinate judicial service by the Governor on the recommendation of the High Court as envisaged by Article 233 and in the absence of any other valid rule, promotions made on the generally well accepted principle of seniority-cum-merit appear to be valid. There is, therefore, no substance in the contention that the promotion of respondents 3, 4 and 5 to the post of DSJ/ADSJ and the promotion of respondents 6 and 7 to the selection grade post were in any manner invalid.

26. Before we conclude it must be pointed out that where the Government acts on the recommendation of the High Court and the action of the Government is challenged by way of a writ petition, in order to facilitate appreciation of issues raised, the administrative side of the High Court, if joined as a party, must appear and place before the court the entire record for a fair and judicial adjudication of the issues on the judicial side of the High Court. In this case the appellants in their writ petition requested the High Court to produce the proceedings which culminated in the recommendation of the High Court to the Governor for appointment of respondents 3, 4 and 5 as

DSJ/ADSJ. No action appears to have been taken on this request because no such records appears to have been produced before the High Court. Such silence militates against fair adjudication of the issues. Just and fair adjudication must not only inform the administrative side of the High Court but in order to put its record beyond the slightest pale of controversy it must avoid any secrecy in this behalf consistent with public interest.

27. If the High Court felt that the criterion for promotion to the post of District Judge being a post of status and responsibility in the judicial hierarchy must only be merit, seniority having no or very little place, it was incumbent upon the High Court to propose such a rule to be made under Article 309 or adopt to itself such a rule and conform to it. But if the High Court on the one hand recommended respondents 3, 4 and 5 according to their seniority as it appears to be the case, when the vacancies occurred and accepted their appointments and on the other hand such appointments were challenged it went in search of a principle on the basis of which promotion to the post of DSJ/ADSJ should be give, it is rather difficult to reconcile these diametrically opposite actions. The High Court also was in error in proceeding to reject the appellants' petition without recording a finding regarding the basis on which recommendations were made by it. We have, however, on the basis of the material before us tried to resolve the said question.

28. Having examined the matter in all its ramifications we see no substance in this appeal and the same is dismissed with no order as to costs.

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