SUPREME COURT OF INDIA

The Gauhati High Court

Vs.

Goto ETE

C.A.No.4298 of 2018

(A.K.Sikri and Ashok Bhushan,JJ.,)

23.04.2018

JUDGMENT

A.K.Sikri, J.,

SLP(Civil)No.23780 of 2016

1. Leave granted.

2. Pursuant to the advertisement dated July 13, 2001 issued by the Government of Arunachal Pradesh, respondent Nos. 1 to 3 (hereinafter referred to as the 'writ petitioners') were appointed as Additional Deputy Commissioners with the powers of Additional Sessions Judge, on contract basis, with the stipulation that their period of contract is up to March 31, 2005. They were to man the Fast Track Courts (for short, 'FTCs'). This contract period was extended for a further period of five years, i.e. up to March 31, 2010. These respondents put their claims for regularisation to the said posts and to be allowed to work as Additional Sessions Judges, invoking the provisions of Rule 7 of the Arunachal Pradesh Judicial Service Rules, 2006. There has been a protracted litigation in this behalf, as would be noticed hereinafter at the relevant stage. At this juncture, while narrating the background in which the matter has landed in this Court, we may only mention that request for appointment on regular basis was rejected by the High Court (the appellant herein) and services of respondent Nos. 1 to 3 were dispensed with on January 07, 2013. This termination was challenged by the writ petitioners by filing Writ Petition (Civil) No. 776 of 2013. The proceedings of this writ petition have culminated in the judgment dated January 19, 2016 passed by the Division Bench of the High Court. Vide this judgment the writ petition has been allowed, thereby quashing the order of dispensing the ad hoc services of the writ petitioners with further direction that the State/respondent No.4 (hereinafter referred to as the 'State Government') should start consultation process for absorption of the writ petitioners in Grade-I of the Arunachal Pradesh Judicial Service with effect from January 07, 2013 and directed the appellant, i.e. the Gauhati High Court (hereinafter referred to as the 'High Court') to consider the cases of the writ petitioners for absorption in the light of the observations made in the said judgment. The High Court feels aggrieved by these directions

and that is the reason for challenging the judgment dated January 19, 2016. Notice in this Special Leave Petition was issued on August 08, 2016 and simultaneously this Court had granted the stay of the impugned judgment. The result is that the writ petitioners have not been taken back into service.

With this background, we now state the factual matrix in some detail.

3. An advertisement was issued on July 13, 2001 by the Government of Arunachal Pradesh inviting applications for filling up of three posts of Additional Deputy Commissioners with the powers of Additional Sessions Judge, on contract basis, for the period up to March 31, 2005. Pursuant thereto, on June 04, 2002, the writ petitioners were selected for the aforesaid posts by the High Court. The State Government issued appointment orders in their favour for the aforesaid post, on contract basis, up to March 31, 2005. This term was subsequently extended for another five years, i.e. up to March 31, 2010. The purpose was to post the incumbents in Fast Track Courts.

4. It is relevant to point out that at that time there was no segregation of executive branch from the judicial wing in the State of Arunachal Pradesh. This was, however, accomplished by promulgating the Arunachal Pradesh Judicial Service Rules, 2006 (hereinafter referred to as the '2006 Rules'), which were notified on December 06, 2006. Rule 7 of the 2006 Rules relate to the method of recruitment and the relevant portion thereof is couched in the following manner:

> "7. Method of recruitment, qualification, reservation and age limit. In respect of each category of posts specified in Column
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> (2) of the Table below, the method of recruitment and minimum qualification, age limit etc. are specified in the corresponding entries in column (3) and (4) thereof.
> Provided that the 3 (three) adhoc Additional Sessions Judges who were selected and appointed by the Government, in consultation with the Gauhati High Court, in the year 2002 as Presiding Officers of the 3(three) Fast Track Courts on contract basis under the specific scheme of the Central Government and have since been rendering services under the control and supervision of the Gauhati High Court, may be considered for absorption in the Grade- I of the Service."

5. On December 13, 2007, a representation was made by respondent Nos. 1 and 2, inter alia, for being absorbed in the regular service in terms of Rule 7 of the 2006 Rules. While this representation was pending, the State Government issued the Notification dated December 17, 2007 establishing two Courts of the District and Sessions Judges. Thereafter, on February 25, 2008, the State Government made a proposal to the High Court, under proviso to Rule 7, for consideration of absorption of the writ petitioners as FTC judges against the two newly created posts of District & Sessions Judge, Grade-I. On March 28, 2008, the Registrar General of the High Court put up a note to the Committee comprising three High Court Judges for consideration of the proposal of the State Government. The Committee, after consideration of the entire material, rejected the proposal for absorption on May 09, 2008.

Respondent No.1 made another representation dated June 12, 2008 for reconsideration of his absorption in the regular service, as a special case, in terms of Rule 7 of the 2006 Rules. This representation also came to be rejected by the Committee on June 25, 2008 by reiterating its earlier resolution dated May 09, 2008.

6.Thereafter, on July 31, 2008, the High Court issued another advertisement for filling up of two posts of District and Sessions Judge, Grade-I, that were created vide Notification dated December 17, 2007. Respondent Nos. 2 and 3 appeared in the examination but could not qualify in the selection process. Respondent No.1, though applied, did not appear in the (arising out of SLP (C) No. 23780 of 2016) examination. Instead, vide Notification dated March 30, 2010, two other candidates were selected and appointed to the notified posts.

7. Respondent No.1 approached this Court by filing Writ Petition (Civil) No. 401 of 2008 under Article 32 of the Constitution of India, seeking absorption in terms of the proviso to Rule 7 of the 2006 Rules. On September 15, 2008, this Court issued notice in the said writ petition. After completion of pleadings, the matter was directed to be listed for final hearing. At that stage, on March 24, 2011, the Registrar General of the High Court filed an additional affidavit, inter alia, stating that the cases for absorption of respondent Nos. 1 and 2 were considered twice (on May 09, 2008 and June 25, 2008 respectively) under the aforesaid proviso to Rule 7, and a decision was taken not to absorb them. Despite this, the State Government has, on April 07, 2011, recommended the names of the writ petitioners for appointment to the High Court. Be that as it may, on May 09, 2011, this Court dismissed the Writ Petition (Civil) No. 401 of 2008, as withdrawn. No liberty was sought for and/or granted to agitate the same issue by filing a fresh writ petition in the High Court.

8. When the things rested at that, the State Government approved extension of term of the FTC judges in the State for a period of five years with effect from April 01, 2011 to March 31, 2015, vide orders dated May 19, 2011. Few months thereafter, i.e. on November 03, 2011, the Governor of the State of Arunachal Pradesh, in consultation with the High Court, converted the three FTCs into Regular Courts of Additional District and Sessions Judges, Grade-I.

9. The Union of India had framed a policy, which was termed as the FTC Scheme. The purpose of this FTC Scheme primarily was to reduce the pendency of criminal cases pending in the respective courts. The anticipated benefits of the FTC Scheme, as projected, were - speedy trial, elimination of pendency in the District Courts, enormous saving of expenses incurred on under trials, etc. Though the FTC Scheme was contemplated to be for a definite period of five years, it came to be extended and remained in force under the judgment of this Court in *Brij Mohan Lal (1) v. Union of India and Others*[1] and directions passed in *Madhumita Das and Others v. State of Orissa and Others*[2]. Many judicial officers were appointed to do the work of FTCs for speedy disposal of certain kinds of matters, including CBI matters, and this was done on the directions given by this Court in Brij Mohan Lal (1). On the recommendations made by the Chief Justices and the Chief Ministers Conference, the Cabinet Committee on Economic Affairs, vide its decision dated April 07, 2005, extended the FTC Scheme for a period of another five years with 100% Central funding. Again, the

FTC Scheme was extended by the decision of the Central Government till March 31, 2011 but thereafter the Union of India had taken a conscious decision not to extend the financing of the FTC Scheme beyond March 31, 2011. Despite discontinuation of the FTC Scheme by the Union of India, some of States decided to continue with the said Scheme. Be that as it may, on abandoning the FTC Scheme by the Union and other States, the judicial officers who were appointed under the FTC Scheme felt aggrieved and it resulted in filing of various petitions in this Court seeking regularisation of their services and absorption against the vacancies appearing in the regular cadre. The controversy was ultimately set to rest by this Court vide judgment dated April 18, 2012 rendered in *Brij Mohan Lal (2) v. Union of India and Others*[3].

10. This Court in Brij Mohan Lal (2), inter alia, directed that all direct recruits to FTCs, who opt for regularisation, shall take written examination to be conducted by the High Courts, followed by interview, and those who are successful in the said selection process would be entitled for appointment to the regular cadre of higher judicial service. As the decision rendered in this case has some bearing on the issue that confronts this Court in the instant appeal, we reproduce some relevant portions of the said judgment hereunder:

> "160. These petitioners have also raised a challenge to Rules 4 and 6 of the Gujarat Rules under which they were appointed, on the ground that the same are arbitrary and discriminatory. Firstly, the Rules under which the petitioners were appointed after 2001 themselves were to be in force only till 31-12-2005. Till 2005, none of the appointees challenged these Rules. For these four years, they in fact took full advantage of their appointment under these Rules and received different service benefits thereunder. We are unable to appreciate the contention that these Rules were arbitrary or discriminatory.
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> 161. The Rules themselves were temporary and were enacted to meet an emergency situation. The appointments were made purely on ad hoc and urgent temporary basis for a period of two years, terminable without any prior notice. A temporary appointment, which itself was made for a period of two years, can hardly be equated to a tenure appointment and must be construed on such terms. These appointments were to come to an end by lapse of time. Such an appointment obviously cannot vest or confer any right upon the appointees to be absorbed in the permanent cadre, as they were not appointed in accordance with the provisions of the Gujarat Judicial Service Recruitment Rules, 1961.
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> 162. The expression "liable to be terminated at any time without any notice" could be susceptible to objections if it was used in the case of a quasi-permanent or permanent employee of a government servant (sic). However, we have already noticed that there were no permanent posts contemplated under the FTC Scheme. The entire FTC Scheme was ad hoc and formulated to operate only until the year 2005. It was continued beyond that period in accordance with the directions of this Court but now a decision has been taken not to continue the FTC Scheme beyond 31-3-2011.

163. Even if for the sake of argument, we accept the contention that the expression "liable to be terminated at any time without any notice" is arbitrary and opposed to the basic rule of law, it still has to satisfy the twin tests laid down in Parshotam Lal Dhingra i.e. firstly, whether the government servant being terminated or reduced in rank thereby had a right to the post or to the rank, as the case may be and, secondly, whether he had been visited with evil consequences. Both of these tests have to be answered in the negative, in the facts and circumstances of the present case.

164. We have already held above that these officers had no right to their posts and consequently, discontinuation of their services in the facts of the present case cannot be construed as punitive or one visiting the petitioners with civil consequences. This holds true even though in some cases, it has been recorded that the performance of these appointees was found to be unsatisfactory but that is not the lone reason given by the High Court for dispensing with their services. It is the discontinuation of the FTC Scheme itself that is the principal reason for terminating the services of all these officers.

176. We have already noticed that the FTC Judges were appointed under a separate set of Rules than the Rules governing the regular appointment to the State Higher Judicial Services. It has been clearly stipulated that such appointments would be ad hoc and temporary and that the appointees shall not derive any benefit from such appointments.

177. In the case of State of Rajasthan, it is the judicial officers from the cadre of Civil Judge, Senior Division, who were promoted as FTC Judges. They have continued to hold those posts for a considerable period. According to these petitioners, they were promoted to the Higher Judicial Services as per the Rules and, therefore, keeping in view the order of this Court in Madhumita Das as well as the very essence of the FTC Scheme, they should be absorbed as members of the regular cadre of Higher Judicial Services of the State of Rajasthan. The State Government had issued a directive that they should undertake the limited competitive examination for their regular promotion/absorption in the higher cadre. These officers questioned the correctness of this directive on the ground that they were promoted as Additional Sessions Judges (FTC) under the Rules and, therefore, there was no question of any further requirement for them to take any written examination after the long years of service that they have already put in in the Higher Judicial Services.

178. The Rajasthan Judicial Service Rules, 2010 are in force for appointment to the Higher Judicial Services of the State. The judgment of this Court in All India Judges' Assn.

(3) case as well as the relevant Rules contemplate that a person who is to be directly appointed to the Higher Judicial Services has to undergo a written examination and appear in an interview before he can be appointed to the said cadre. As far as appointment by promotion is concerned, the promotion can be made by two different

modes i.e. on the basis of seniority-cum-merit or through out-of-turn promotion wherein any Civil Judge, Senior Division who has put in five years of service is required to take a competitive examination and then to the extent of 25% of the vacancies available, such Judges would be promoted to the Higher Judicial Services.

179. It was admitted before us by the learned counsel appearing for the petitioners that these officers who were promoted as ad hoc FTC Judges had not taken any written competitive examination before their promotion to this post under the Higher Judicial Services. In other words, they were promoted on ad hoc basis depending on the availability of vacancy in FTCs. Once the Rules required a particular procedure to be adopted for promotion to the regular posts of the Higher Judicial Services, then the competent authority can effect the promotion only by that process and none other. In view of the admitted fact that these officers have not taken any written examination, we see no reason as to how the challenge made by these judicial officers to the directive issued by the State Government for undertaking of written examination may be sustained. Thus, the relief prayed for cannot be granted in its entirety.

180. In the case of the States of Punjab and Haryana, the appointees were directly appointed as FTC Judges by way of direct recruitment from the Bar and they prayed for regularisation of their services and absorption in the regular cadre as well as for continuation of the FTC Scheme till their absorption. For the reasons already recorded by us in relation to other States mentioned above, we do not think that the relief of regularisation/absorption can be granted to these petitioners also in the manner in which they have prayed. They too have no right to the post. Admittedly, these candidates also did not pass any written competitive examination and were appointed solely on the basis of an interview and must now undergo the requisite examination.

207. Without any intent to interfere with the policy decision taken by the Governments, but unmistakably, to protect the guarantees of Article 21 of the Constitution, to improve the justice delivery system and fortify the independence of judiciary, while ensuring attainment of constitutional goals as well as to do complete justice to the lis before us, in terms of Article 142 of the Constitution, we pass the following orders and directions:

207.9 All the persons who have been appointed by way of direct recruitment from the Bar as Judges to preside over FTCs under the FTC Scheme shall be entitled to be appointed to the regular cadre of the Higher Judicial Services of the respective States only in the following manner:

(a) The direct recruits to FTCs who opt for regularisation shall take a written examination to be conducted by the High Courts of the respective States for determining their suitability for absorption in the regular cadre of Additional District Judges.

(b) Thereafter, they shall be subjected to an interview by a Selection Committee consisting of the Chief Justice and four seniormost Judges of that High Court.

(c) There shall be 150 marks for the written examination and 100 marks for the interview. The qualifying marks shall be 40% aggregate for general candidates and 35% for SC/ST/OBC candidates. The examination and interview shall be held in accordance with the relevant Rules enacted by the States for direct appointment to Higher Judicial Services.

(d) Each of the appointees shall be entitled to one mark per year of service in the FTCs, which shall form part of the interview marks.

(e) Needless to point out that this examination and interview should be conducted by the respective High Courts keeping in mind that all these applicants have put in a number of years as FTC Judges and have served the country by administering justice in accordance with law. The written examination and interview module, should, thus, be framed keeping in mind the peculiar facts and circumstances of these cases.

(f) The candidates who qualify the written examination and obtain consolidated percentage as aforeindicated shall be appointed to the post of Additional District Judge in the regular cadre of the State.

(g) If, for any reason, vacancies are not available in the regular cadre, we hereby direct the State Governments to create such additional vacancies as may be necessary keeping in view the number of candidates selected.

(h) All sitting and/or former FTC Judges who were directly appointed from the Bar and are desirous of taking the examination and interview for regular appointment shall be given age relaxation. No application shall be rejected on the ground of age of the applicant being in excess of the prescribed age. ”

11. Reverting to the developments in the present case, it may be stated that though the representations of writ petitioners for absorption on regular basis were earlier rejected twice, the High Court still took a decision on July 31, 2012 to undertake selection process of FTC Judges in terms of the aforesaid judgment of this Court in Brij Mohan Lal (2). Accordingly, written examination was held in which the writ petitioners appeared. These writ petitioners could secure only 22.33%, 33.66% and 25% marks respectively as against the qualifying marks of 35% required in the said examination. In this way, none of these writ petitioners could qualify this examination. On their failure to quality, the High Court, vide orders dated January 07, 2013, dispensed with their services. Within three days thereafter, i.e. on January 10, 2013, the High Court issued an advertisement inviting applications from eligible candidates for appointment to three vacant posts in the Grade-I cadre of the Arunachal Pradesh Judicial Service created on November 03, 2011.

12. The writ petitioners filed Writ Petition (Civil) No. 776 of 2013 in the High Court on February 05, 2013, challenging the order dated January 07, 2013 dispensing their services. Challenge was also laid to the legality of the advertisement issued on January 10, 2013 and claimed absorption on the basis of proviso to Rule 7 of the 2006 Rules. In the meantime, written examination was held on March 23, 2013 pursuant to the aforesaid advertisement, in which seven candidates were found eligible having secured more than the cut-off marks of 60% for the General Category candidates and 50% for the ST Candidates. None of the writ petitioners appeared in the said examination. Oral interview of the qualified candidates was held on April 09, 2013 by the four sitting High Court Judges (including the Chief Justice) and the names of respondent Nos. 6 to 8 were recommended consequent upon their qualification.

13. The writ petition along with the stay application was listed before the Court on April 11, 2013 when the Division Bench of the High Court was pleased to admit the same. However, since no interim relief was sought, no such order came to be passed. On that date, the High Court recommended for appointment the names of respondent Nos. 6 to 8 having been selected both in written and viva voce examination. Exactly one month thereafter, i.e. on May 11, 2013, the State Government created further three posts in Grade-I of the Arunachal Pradesh Judicial Service. Pursuant to the recommendation dated April 11, 2013 of the High Court, respondent Nos. 6 to 8 were appointed as Grade-I officers by the State Government under the 2006 Rules. The writ petitioners sought amendment of the writ petition by challenging appointment of respondent Nos. 6 to 8. On August 13, 2013, the High Court allowed the writ petitioners to amend the writ petition by inserting challenge to the appointment order dated April 11, 2013 in favour of respondent Nos. 6 to 8.

14. After hearing the said writ petition, vide the impugned judgment dated January 19, 2016, the High Court has allowed the relief claimed therein and set aside the order dated January 07, 2013 dispensing the ad hoc services of the writ petitioners as Additional District and Sessions Judge of FTCs in the State of Arunachal Pradesh. It has further directed the State Government to start consultation process for absorption of the writ petitioners in Grade-I of the Arunachal Pradesh Judicial Service with effect form January 07, 2013 and directed the High Court to consider their absorption in the light of the observations made in the impugned judgment.

15. A perusal of the impugned judgment of the High Court would reveal that it posed the following question for determination which arose in the said writ petition:

> "Whether the ad hoc services of the petitioners can be regularised in accordance with the proviso to Rule 7 of Arunachal Pradesh Judicial Service Rules, 2006 ("the Rules" for short)?"

16. The High Court noted that initial appointment of the writ petitioners as Additional Deputy Commissioners on contract basis with the powers of ad hoc Additional Sessions Judge in the year 2001 at a fixed pay of Rs.19,000/- was pursuant to an advertisement by the Government. The writ petitioners had applied for the said post, had appeared in the written

test and were interviewed by the High Court. The Full Court had approved the appointment of the writ petitioners and pursuant to the said recommendation the Government issued orders of appointment appointing them as the Presiding officers of the FTCs. Their services were extended for a period of five years with effect from April 01, 2005. Before the expiry of the terms of the FTC, the High Court, vide its letter dated February 19, 2010, recommended to the State Government for extension of the terms of the FTC with effect from April 01, 2010 for a further period of ten years and the same was approved by the State Government vide its communication dated May 19, 2011 for a period of five years, i.e. up to March 31, 2015. In the meantime, the 2006 Rules came into force, which, among others, contained the proviso to Rule 7 for consideration of the writ petitioners for absorption to Grade-I service. The State Government, vide letter dated February 25, 2008, proposed to absorb the writ petitioners against the newly created posts of Grade-I in the State Judicial Service by invoking the aforesaid proviso to Rule 7 of the 2006 Rules by pointing out that they were appointed after due selection in consultation with the High Court and had been working under the control and supervision of the High Court. This proposal was not accepted by the High Court. The Chief Secretary of the State Government thereafter sent another letter dated August 25, 2008 requesting the High Court to absorb the writ petitioners in terms of proviso to Rule 7 of the 2006 Rules based on their performance, integrity, etc. However, this proposal was once again rejected by the High Court. Thereafter, the writ petitioners approached the State Government for conversion of the post of ad hoc FTCs into regular courts of Additional District and Sessions Judge. This request was acceded to by the State Government and it was decided to convert the FTCs into regular courts of Additional District and Sessions Judge along with their incumbents, i.e. the writ petitioners, and the same was forwarded to the High Court. Even Notification dated November 03, 2011 was issued in this behalf.

17. After taking note of the aforesaid chronology of events, the Division Bench of the High Court has observed that in view of these developments, the writ petitioners should have been regularised. However, instead of considering the cases of the writ petitioners for absorption, the High Court decided to hold the written and viva voce tests in terms of the decision in Brij Mohan Lal (2). The writ petitioners appeared, but failed. According to the Division Bench of the High Court, there was no reason for conducting such a test as the matter had to be examined in terms of proviso to Rule 7 of the 2006 Rules, which provision was perfectly tailor-made for the writ petitioners. The Division Bench has further opined that the case of the writ petitioners could not be dealt with on the basis of the directions given by this Court in Brij Mohan Lal (2) having regard to the specific rule in the form of Rule 7, as can be seen from the following discussion:

> "13. There is no dispute that dispensing with the services of the petitioners is the immediate fall out of the failure on their part to secure the minimum qualifying marks in the examination for their absorption into the service. Undoubtedly, judicial service of the State of Arunachal Pradesh is now under the control and supervision of the Gauhati High Court; the High Court has the undoubted authority to decide as to whether the services of the petitioners should be continued or not irrespective of the terms of extension of the ad-hoc services of the petitioners by the State Government.

However, in this case, what is of significance is the question of absorption of the services of the petitioners in the posts of Grade-I in the Arunachal Pradesh Judicial Service Rules in terms of the proviso to Rule 7 of the Rules. The question is whether the decision of the Apex Court in Brij Mohan Lal case (supra) read as a whole can be construed to mean that any form of absorption irrespective of the nature of the appointment of ad hoc Judges of Fast Track Court is prohibited. The law is well-settled. A judgment of court cannot be read like Euclid's theorem and shall have to be read in the context in which it was decided. In the case at hand, it cannot be disputed that the petitioners were given the appointments on contract basis after the posts were advertised, and they underwent selection process conducted by the High Court.

In Brij Mohan Lal case (supra), the Apex Court apparently distinguished appointment by back door and appointment made after written competitive examination."

18. Thereafter, the High Court discussed the nature of appointments to FTCs made by various States, including the States of Punjab and Haryana, and found that in those cases persons were not appointed as judicial officers through any written examination but were appointed solely on the basis of an interview. In contrast, insofar as these persons are concerned, the Division Bench of the High Court has held that in the instant case, the writ petitioners had admittedly appeared and got selected in the recruitment examination and the interview conducted by the High Court on the basis of the advertisement made by the State Government. Their appointments were also made after the approval of the High Court. Therefore, the writ petitioners were needlessly required to undergo written and oral test some 10 years or more after service as ad hoc Judges, against whom there were nothing on record to show that they were incompetent or corrupt in the discharge of their judicial works.

19.Giving the aforesaid reasons, the Division Bench of the High Court has allowed the writ petition in the following terms:

"16. For what has been stated in the foregoing, this writ petition is allowed in the following terms:

(a) The State-respondents are directed to start forthwith the consultation process for absorption of the petitioners in Grade-I of the Arunachal Pradesh Judicial Service with effect from 7-1-2013.

(b) On receipt of the proposal for the absorption from the State Government, the High Court shall consider for the approval of the absorption of the petitioners in the light of the observations made by us in the foregoing.

(c) If and when the absorption of the petitioners in Grade-I of the Arunachal Pradesh Judicial Service is done, they will not disturb the seniority of the private respondents.

(d) The past services rendered by the petitioners during the period of their ad-hoc services shall be counted for all purposes except for seniority and monetary benefits.

(e) The entire exercise shall be completed by both the State respondents and the High court within a period of three months form the date of receipt of this judgment.

(f) The parties are directed to bear their respective costs."

20. Mr. Vijay Hansaria, learned senior counsel appearing for the High Court, questioned the correctness of the aforesaid reasoning and submitted that some glaring aspects have been glossed over and due weightage is not given to these aspects which are sufficient to turn the scales in favour of the High Court and against the writ petitioners. He highlighted the following aspects of the case:

(a) All these writ petitioners were appointed on ad hoc and contractual basis for a specific term, that too in FTCs, which scheme itself was temporary in nature. Such a kind of appointment, in normal course, would not confer any legal right upon the writ petitioners to seek regular appointment.

(b) At the time of contractual engagement of the writ petitioners there was no division between the executive and the judicial branch of the State. This separation came into effect in the year 2006 with the promulgation of the Arunachal Pradesh Service Rules, 2006. Rule 7 of these Rules provided method of recruitment, etc. Proviso thereto was only an enabling provision which gave discretion to the High Court to consider writ petitioners for absorption in Grade-I of the service. It was argued that the words 'may be considered' clearly suggest that if at all these three writ petitioners only had a right to be considered but there was no right to get absorption automatically.

(c) Their cases were duly considered by the Committee of three High Court Judges, which Committee, after consideration of the entire material, rejected the proposal twice for absorption of the writ petitioners in the regular cadre.

(d) Even when advertisement for two posts of District and Sessions Judge (Grade-I) were created vide Notification dated December 17, 2009 and two of the writ petitioners (respondent Nos. 2 and 3 herein) appeared in the examination, they did not qualify in the selection process. Respondent No.1 did not even appear in the examination. This, according to the learned senior counsel, shows that they did not have sufficient competence and, therefore, failed to qualify the examination.

(e)Brij Mohan Lal (2) lays down the law and specifies the procedure which has to be followed for regularisation of those appointed to FTCs. As per this, regularisation can take place only after the written examination is conducted by the High Court followed by the interview and the incumbents/candidates are successful in the said selection process. After this judgment, this process was undertaken in which all the three writ petitioners appeared, but again failed to get the qualifying marks of 35%.

21. By highlighting the aforesaid facts, it was submitted that the cases of the writ petitioners were considered under Rule 7 of the 2006 Rules as well as in terms of the judgment in Brij Mohan Lal (2) and on both the occasions the writ petitioners were found unsuccessful for regularisation. The learned senior counsel also submitted that the Division Bench of the High Court in the impugned judgment has proceeded on the basis as if the proviso to Rule 7 mandatorily required the High Court to absorb these writ petitioners in the regular cadre whether they are fit for the same or not. That was not the intention of the proviso to Rule 7 of the 2006 Rules.

22. Mr. Hansaria even questioned the maintainability of the writ petition insofar as respondent No.1 is concerned with the submission that he had earlier filed the petition in this Court which was withdrawn by him after full scale hearing and no liberty was given to the said writ petitioner to file another writ petition. The writ petition filed by this writ petitioners in the High Court was, therefore, barred by principles of res judicata, as held in *Sarguja Transport Service v. State Transport Appellate Tribunal, M.P., Gwalior and Others*[4] . He also placed reliance upon the judgment of this Court in *Mahesh Chandra Verma and Others v. State of Jharkhand and Others*[5], which case again pertained to regularisation of those appointed as Additional District Judges in FTCs directly from the Bar. The Court in that case had draw distinction between irregular and illegal appointments and further, going by the nature of these appointments, laid down the manner of regularisation of such persons, if permissible. He also pointed out that Brij Mohal Lal (2) was specifically taken note of and it was clarified that the directions given in the said judgment were in exercise of powers of the Supreme Court under Article 142 of the Constitution of India, as can be see from the following discussion:

> "53. In Brij Mohan Lal (2), this Court has, after considering the entire matter in its proper perspective, held that the Judges of FTCs were holding ex-cadre post. We cannot reopen the settled position now. Certain judgments cited in this regard need not, therefore, be discussed. Besides, they have no application to this case. It was argued that certain Assistant Public Prosecutors were appointed as FTC Judges. It was also urged that the age criteria was not abided by. We do not propose to go into those submissions because in the peculiar circumstances of that case, in Brij Mohan Lal (2), this Court has given certain directions in terms of Article 142 of the Constitution to improve justice delivery system, to attain the constitutional goals and to do complete justice. One of the directions pertains to the regularisation of the appellants in the manner laid down therein. It is impossible to hold that the appellants' case is not governed by the said judgment.
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> 54. Indeed, the appellants have referred to their long¬standing services as FTC Judges. They have left their practice at the Bar. Some of them have become age-barred. Certain judgments have been cited before us in support of the submission that these facts need to be considered and they must be absorbed in the regular services. Brij Mohan Lal (2) considers this grievance. Hence, it is not necessary to refer to the cases cited on this point.

55. We have repeatedly referred to Brij Mohan Lal (1) and Brij Mohan Lal (2). It is now necessary to see what they lay down. The Eleventh Finance Commission allocated funds for the purpose of setting up of 1734 courts in various States to deal with the long-pending cases. The Finance Commission suggested that States may consider reemployment of retired Judges for a limited period since these courts were to be ad hoc courts in the sense that they would not be a permanent addition to the existing courts. The Fast Track Courts Scheme was challenged on various grounds. The said challenge was dealt with by this Court in Brij Mohan Lal (1). This Court issued a number of directions in relation to establishment and functioning of FTCs. It was made clear that while making appointments, third preference should be given to direct recruits from the Bar. The following direction is material in this behalf: (Brij Mohan Lal (1) case, SCC p. 8, para 10)

"10. ... (4) The third preference shall be given to members of the Bar for direct appointment in these courts. They should be preferably in the age group of 35-45 years, so that they could aspire to continue against the regular posts if the Fast Track Courts cease to function. The question of their continuance in service shall be reviewed periodically by the High Court based on their performance. They may be absorbed in regular vacancies, if subsequent recruitment takes place and their performance in the Fast Track Courts is found satisfactory. For the initial selection, the High Court shall adopt such methods of selection as are normally followed for selection of members of the Bar as direct recruits to the Superior/Higher Judicial Services."

56. The Fast Track Courts Scheme was in operation till 31¬3-2011. But thereafter the Union of India took a decision not to continue the financing of the Fast Track Courts Scheme beyond 31-3-2011. Some States decided to continue the Fast Track Courts Scheme and some States decided not to continue it. Several writ petitions were filed thereafter inter alia praying that necessary directions be given to the respondents to extend the Fast Track Courts Scheme and release necessary funds for that purpose. Some of the petitioners who were direct recruits claimed absorption in the regular cadre.

57. While dealing with the points raised in the petitions, this Court in Brij Mohan Lal (2) traced the history of the Fast Track Courts Scheme. This Court considered the notifications issued by various States appointing direct recruits, relevant rules of different States and methodology adopted for appointment to the FTCs and came to the conclusion that the said posts were temporary and the appointees cannot be said to have any legal right to the posts. It was observed that the appointments were governed under the separate set of rules than the rules governing the regular appointments to the State Higher Judicial Services. This Court observed that the cumulative effect of the notifications appointing the petitioners therein to the said posts under the Fast Track Court Scheme and the relevant rules governing them clearly demonstrate that those were temporary and, in some cases, even time- bound appointments terminable without prior notice and, therefore, it is difficult to accept the contention that the

appointees were entitled to be absorbed regularly in those posts. It was observed that where neither the post is sanctioned nor it is permanent and, in fact, the entire arrangement is ad hoc or is for an uncertain duration, it cannot create any rights and obligations in favour of the appointees, akin to those of permanent employees."

23. Insofar as the case at hand is concerned, after noticing that the appointments were of irregular nature, the Court passed the following directions:

"62. Indisputably, the appellants were not appointed on any permanent post. The notification of their appointment dated 12-8-2002 clearly states they were appointed against temporary and ex-cadre posts on ad hoc basis. They were not appointed under the Rules of 2001. Their appointment was made for a temporary purpose in a temporary scheme created for speedy disposal of cases. Their case is, therefore, clearly covered by Brij Mohan Lal (2). The directions given therein, particularly those contained in para 207.9 which we have quoted above, will clearly apply to them. In Brij Mohan Lal (2), this Court even considered the contention that the direct recruits had taken all the tests and, therefore, they should not be made to undergo them again. After considering this argument, this Court directed that they will have to take written examination and they must also be interviewed. It must be noted at this stage that on behalf of the High Court of Jharkhand a statement is made that subject to the creation of necessary posts/FTCs by the State of Jharkhand, the High Court will consider the appellants' case afresh in terms of the decision of this Court in Brij Mohan Lal (2). The High Court has also taken up the matter with the State Government. Relevant portion from the affidavit of Shri Ambuj Nath, Registrar (Administration), High Court of Jharkhand, needs to be quoted:

"19. That as per the recommendation of the 13th Finance Commission the Jharkhand High Court has requested the State Government to constitute 31 alternative courts in the cadre of Superior Judicial Service coterminous with the Holiday Courts/Shift Court Scheme of the 13th Finance Commission as the terrain and deteriorating the law and order situation was not congruent for holding morning/evening/shift courts. However, after the direction of the Hon'ble Apex Court in Brij Mohan Lal (2) case, the Jharkhand High Court has taken up the matter with the State Government for creation of 31 permanent Fast Track Courts instead of 31 alternative courts coterminous with the morning and evening shift courts and an expansion of 10% of cadre strength as per the direction of the Hon'ble Apex Court in Brij Mohan Lal (2) case in response to the direction dated 19-4-2012."

63. The State of Jharkhand will now have to take steps to comply with directions issued in Brij Mohan Lal (2), if it has not complied with them so far. The State of Jharkhand and the High Court will have to work in sync to ensure that the directions to appoint the appellants in the regular cadre in Higher Judicial Service are complied with strictly in the manner laid down in Brij Mohan Lal (2)."

On that basis, it was argued that passing of the examination in terms of Brij Mohan Lal (2) was incumbent.

24. Mr. Vikas Singh, learned senior counsel appearing for these writ petitioners, on the other hand, submitted that the High Court is right in observing that proviso to Rule 7 of the 2006 Rules was tailor-made for these writ petitioners and also keeping in view the spirit of the decision in Brij Mohan Lal (2). He laid great emphasis on the fact that the State Government had considered the case of the writ petitioners and recommended the High Court two times to absorb the writ petitioners, but the High Court adopted adamant attitude in ignoring those recommendations. He also submitted that the case of the writ petitioners was different from the cases which were dealt with by this Court in Brij Mohan Lal (2), whereas in Brij Mohan Lal (2) this Court was confronted with the situation where the appointments to FTCs were made without following proper procedure and those cases were in the nature of back-door entries, it was not so insofar as the writ petitioners are concerned. He, thus, argued that the High Court had rightly distinguished Brij Mohan Lal (2) by specifically noticing the aforesaid difference inasmuch as the writ petitioners are appointed after proper written test as well as interview, whereas no written test was taken in respect of those persons who were appointed by the State of Haryana, etc. and their appointments were made only on the basis of interview.

25. After taking note of the facts of this case, we may observe at the outset that if the matter of regularisation of the writ petitioners was to be considered in terms of Brij Mohan Lal (2), the writ petitioners have remained unsuccessful. This is because of the reason that in terms of Brij Mohan Lal (2), written examination was undertaken by the High Court in which all the three writ petitioners appeared, but they failed to achieve the qualifying marks. Therefore, if that standard is to be applied, the writ petitioners have not been able to qualify the examination and cannot claim absorption in the regular service. However, whether Brij Mohan Lal (2) would apply or not is a moot question. The High Court has distinguished the judgment of Brij Mohal Lal (2) and has held that that is not applicable. However, since the High Court Bench has examined the matter in terms of the proviso to Rule 7 of the 2006 Rules, we may first consider as to whether its approach relating to this facet is correct in law.

26. Rule 7 has already been reproduced above, which lays down the procedure and method of recruitment to the post of Additional Sessions Judges. The case of the writ petitioners is not covered by the main provision. As noticed above, when two posts of Grade-I District and Sessions Judges, after their creation vide Notification dated December 17, 2007 were advertised, two of the writ petitioners appeared but failed to qualify in the said selection process while the third writ petitioner did not appear at all. Adverting to the proviso of Rule 7, no doubt, it was tailor-made for the writ petitioners. However, this proviso only suggests that cases of three ad hoc Additional Sessions Judges, who were none else but the three writ petitioners, may be considered' for absorption in Grade-I of the service. It is not necessary to go into the question as to whether the word 'may' would mean that it was entirely within the discretion of the High Court to even consider or not to consider the cases of the writ petitioners for absorption or whether this word has to be read as 'shall' thereby holding that it was mandatory on the part of the High Court to at least consider the cases of the writ

petitioners for absorption. This is because of the reason that as matter of fact the cases of the writ petitioners were considered by the High Court and, in fact, that appears to be the intention behind the proviso. However, the provision provided only to 'consider' the cases of the writ petitioner for absorption. The proviso never gave any mandate that the writ petitioners had to be necessarily absorbed. Thus, only right of consideration was there. There was no automatic absorption. Had that been the intention, the proviso would have been worded differently.

27. Insofar as consideration is concerned, the position prevalent on record of this case is somewhat curious. A Committee of three High Court Judges had considered twice the cases of the writ petitioners. As per the High Court this consideration was done by looking into the entire material, but the proposal for absorption was rejected on both occasions. On the other hand, insofar as the Government is concerned, it had recommended the case of the writ petitioners for absorption. It is this factor which has weighed with the Division Bench of the High Court. However, we are of the opinion that this approach is unsustainable in law, having regard to the mandate of Articles 233 to 235 of the Constitution of India. These provisions are aimed at securing the independence of the Judiciary from the Executive. These Articles provide a complete code for regulating recruitment and appointment to the District Judiciary and the Subordinate Judiciary. It has been held in *Rajendra Singh Verma (Dead) through Lrs. and Others v. Lieutenant Governor (NCT of Delhi) and Othes*[6] that the scheme envisaged in the aforesaid provisions of the Constitution does not permit the State to encroach upon the area covered by these Articles. We may also reproduce, with benefit, following discussion fro*m Ajit Kumar v. State of Jharkhand and Others*[7]*:*

> "17. It cannot be disputed that the power under the aforesaid articles is to be exercised by the Governor in consultation with the High Court. Under the scheme of the Indian Constitution the High Court is vested with the power to take decision for appointment of the subordinate judiciary under Articles 234 to 236 of the Constitution. The High Court is also vested with the power to see that the high traditions and standards of the judiciary are maintained by the selection of proper persons to run the District Judiciary. If a person is found not worthy to be a member of the judicial service or it is found that he has committed a misconduct he could be removed from the service by following the procedure laid down. Power could also be exercised for such dismissal or removal by following the preconditions as laid down under Article 311(2)(jb) of the Constitution of India. Even for imposing a punishment of dismissal or removal or reduction in rank, the High Court can hold disciplinary proceedings and recommend such punishments. The Governor alone is competent to impose such punishment upon persons coming under Articles 233-235 read with Article 311(2) of the Constitution of India. Similarly, such a power could be exercised by the High Court to dispense with an enquiry for a reason to be recorded in writing and such dispensation of an enquiry for valid reasons when recommended to the Governor, it is within the competence of the Governor to issue such orders in terms of the recommendation of the High Court in exercise of power under Article 311(2)(b) of the Constitution of India."

28. It has also been authoritatively held in *Chandramouleshwar Prasad v. Patna High Court and Others*[8], which is now a settled position of law, that the Governor cannot appoint a nominee of his without obtaining the views of the High Court, even where he is not prepared to accept the nominee of the High Court . The reason is, whether in the case of promotion from the Subordinate Judiciary or of direct recruitment from the Bar, the performance of the candidate would be best known to the High Court. This is so succinctly brought out in High Court of *Punjab and Haryana and Others v. State of Haryana and Others*[9] in the following words:

> "49. The confirmation of persons appointed to be or promoted to be District Judges is clearly within the control of the High Court for these reasons. When persons are appointed to be District Judges or persons are promoted to be District Judges the act of appointment as well as the act of promotion is complete and nothing more remains to be done. Confirmation of an officer on successful completion of his period of probation is neither a fresh appointment nor completion of appointment. Such a meaning of confirmation would make appointment a continuing process till confirmation. Confirmation of District Judges is vested in the control of the High Court for the reason that if after the appointment of District Judges the Governor will retain control over District Judges until confirmation there will be dual control of District Judges. The High Court in that case would have control over confirmed District Judges and the Governor would have control over unconfirmed District Judges. That is not Article 235.
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> 50. In the recent decision in Samsher Singh v. State of Punjab this Court held that the High Court under Article 235 is vested with the control over subordinate Judiciary. This Court said that before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or he is suitable for the post. In the absence of any rules governing the probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this. The suitability of a person to a post is of paramount importance in considering the question of confirmation."

Thus, the control vests with the High Court.

29. We are also of the opinion that the Division Bench in the impugned judgment has given undue credence to the initial recruitment process wherein the writ petitioners were selected inasmuch as it has held that at the time of their recruitment written examination and interview were held pursuant to which the writ petitioners were selected. What is to be borne in mind is that the said process was for appointment for a limited purpose and that too on contract basis and if that was so, proviso to Rule 7 of the 2006 Rules would have specifically made provision to this effect, which was not done. Such a kind of appointment, normally, would not confer any right of regularisation.

30. The impugned judgment also does not look the matter in proper perspective by observing that since the writ petitioners had worked for ten years approximately, as ad hoc Judges, and since there was nothing on record to show that they were incompetent or corrupt in discharge of their judicial work, they should have been absorbed in the regular cadre. It is stated at the cost of repetition that their service records were examined by the Committee consisting of three High Court Judges and on the said examination the Committee was of the opinion that the writ petitioners were not entitled for appointment to the regular cadre of Higher Judicial Service. No challenge was laid by the writ petitioners to the manner in which their cases were considered and rejected by the High Court or that such a consideration suffered from any kind of blemish. Even otherwise, such a decision of the Committee stands vindicated inasmuch as:

(i) the two writ petitioners who appeared in the examination pursuant to an advertisement for the post of Grade-I District and Sessions Judge failed to qualify in the selection process and the third writ petitioner did not appear at all; and

(ii) the petitioners even failed to qualify the test which was conducted pursuant to Brij Mohan Lal (2) in which the writ petitioners had appeared. This fact is noted just to point out the incompetence of the writ petitioners. Otherwise, our decision is based on the analysis of proviso to Rule 7.

31. Having regard to the above, it is not even necessary to discuss as to whether ratio of Brij Mohan Lal (2) applies or not. However, suffice is to state that ratio of Brij Mohan Lal (2) is discussed by this Court in detail in the case of Mahesh Chandra Verma and there also the Court was of the opinion that appointment on regular cadre should be made only on the basis of written examination etc. as laid down in Brij Mohan Lal (2). We again clarify that, in any case, we have come to the conclusion that even in terms of proviso to Rule 7 of 2006 Rules the cases of the writ petitioners were considered, but they were not found fit for absorption in the regular cadre.

32. As a result, this appeal succeeds and is allowed thereby setting aside the impugned judgment.

33. No costs.

Judgment Referred.

[1](2002) 5 SCC 0001 *[2](2008) 6 SCC 0731* *[3](2012) 6 SCC 0502*
[4](1987) 1 SCC 0005 *[5](2012) 11 SCC 0656* *[6](2011) 10 SCC 0001*
[7](2011) 11 SCC 0458 *[8](1969) 3 SCC 0056* *[9](1975) 1 SCC 0843*