ANDHRA PRADESH HIGH COURT

Sathya Kumar

Vs.

State of A.P

Writ Petn. No. 3458 of 1969

(Gopal Rao Ekbote and Sri Ramulu, JJ.)

03.02.1970

JUDGMENT

Gopal Rao Ekbote, J.

1. This is an application under Article 226 of the Constitution of India filed by 19 petitioners praying for the issue of a writ of Mandamus or any other appropriate writ, direction or order and to declare the existing seniority list of the Subordinate Judges in the Andhra Pradesh as invalid and to quash the said seniority list and to direct preparation of a proper seniority list according to law showing the petitioners as senior to respondents 3 to 12.

2. The facts necessary to appreciate the contentions raised before us may briefly be stated.

3. As a consequence of the reorganization of States, Telengana area was joined to Andhra area forming the State of Andhra Pradesh. According to Section 115 of the States Reorganization Act several of the personnel holding the post of the Munsif-Magistrate in the former Hyderabad State Judicial Service were allotted to the existing Andhra State Judicial Service. Consequent on such allocation, the question of their integration in the Andhra Pradesh State Judicial Service and the equation with their counterparts in the Andhra State Judicial Service, viz., District Munsifs, arose.

4. Certain principles in respect of equation of posts and integration of services belonging to the various regions forming part of the State were settled at the Conference of the Chief Secretaries of all the reorganised States. These decisions included the decision in regard to the first promotion of the officers protected by Part X of the States Reorganisation Act. The decision was that the promotion at the first stage from the post which protected employees were occupying immediately before 1-11-1956 should be made in accordance with the rules governing the service of the protected employees. It is in this connection necessary to bear in mind the proviso to Section 115 (7) of the States Reorganisation Act according to which provision the service conditions of the protected employees would not be altered affecting them adversely without a prior permission of the Government of India.

5. The jurisdiction, the pay scale and the mode of selection of Sub Judges in both these regions were separate. These posts, however were to be filled in both these regions from the posts of District Munsifs in the Andhra area and the Munsif-Magistrates in the Telengana area by way of promotion.
6. At the time of the States Reorganisation, the District Munsifs of Andhra area were on a higher pay scale viz., Rs. 300-700 than that of their counterparts in Telengana area who were in the grade of Rs. 250/- - 550/-. The District Munsifs were exercising ordinary pecuniary civil jurisdiction up to Rupees 5000/- and also of small cause jurisdiction up to Rs. 500/- while the Munsif-Magistrates had pecuniary civil jurisdiction up to Rs 2000/- and small cause jurisdiction upto Rs. 50/- only.

7. Despite the above said difference in the pay scale and the scope of their jurisdiction, the posts of Munsif-Magistrates in Telengana area keeping in view the decisions arrived at the Chief Secretaries' conference were equated with the posts of the District Munsifs in the Andhra area. Subsequent to this equation of posts, the pecuniary jurisdiction of the Munsif-Magistrates and Sub-Judges in Telengana area was enhanced.

8. After the equation of the said posts the question of drawing up one integrated common seniority list was to be resolved. The said question obviously was to be settled in accordance with the provisions of Part X of the States Reorganisation Act. Along with it. the question of integration of Rules prevailing in the two areas on 1-11-1956 governed the personnel of the two regions was also to be settled.

9. A provisional common gradation list of the District Munsifs and Munsif-Magistrates was accordingly prepared by the High Court in 1957. It was published in G. O. 1540, dated 19-9-1957. It was forwarded to the State Government. The State Government after satisfying themselves that the list was in conformity with the principles laid down by the Conference of Chief Secretaries referred the list to the Advisory Committee constituted under Section 115 (5) of the States Reorganisation Act. The State Government accepted the advice of the Advisory Committee and conveyed their approval in respect of the provisional common gradation list of the District Munsifs and Munsif-Magistrates.

10. The provisional common gradation lists were communicated to all concerned District Munsifs and Munsif-Magistrates so that representation against the inter se seniority fixed by them might be made to the Government of India. The representations made by the aggrieved officers having been considered by the Government of India and the results conveyed to all concerned officers viz., District Munsifs and Munsif-Magistrates of both the regions, the final common gradation list was published in G. O Ms. No. 501 dated 6-4-1966.

11. The respondents were among the candidates selected in 1955 by the Andhra Public Service Commission. They were acting continuously even prior to 1-11-56 as District Munsifs in the Andhra Area. Although they were in the approved list, their appointments were made temporarily in the first instance. All of them were later declared to have been put on probation. The High Court wrote to the Home Secretary to the Government of Andhra Pradesh on 5-2-1962 to assign ranks to the respondents in the common gradation list of District Munsifs. It is not clear as to when they were made permanent. But it is clear that they must have been made permanent after 1-11-1956. That is why the said letter seeks ranking of the respondents in the common

gradation list. After some correspondence, the Government of Andhra Pradesh by their Memo No. 950/ 64/1 dated 18-6-1964 issued amendments to the provisional common gradation list appended to G. O. Ms. No. 1540 dated 19-9-1957. The respondents' serial numbers then appeared between 136 and 173.

12. It is not doubted that all the respondents were juniors to all the petitioners who were appointed as Munsif-Magistrates prior to 1950 and ranked in the provisional list as well as in the final list much higher than all the respondents.

13. The said Memo by which the respondents' names were included in the provisional common gradation list was communicated to them. It appears that the communication was dispatched on 10-7-1964 from the High Court. The endorsement appears under the signature of the Assistant Registrar and the concerned Superintendent.

14. Pending the issue of a final common gradation list and integration of judicial service rules, promotions from the posts of District Munsifs to the Posts of Subordinate Judges were made by the High Court on grounds of merit and ability, that is, by selection judged by the standards necessary for promotion to the posts of Subordinate Judges. The Munsif-Magistrates of Telengana area were considered separately and the High Court made promotions even in their cases by selection by assessing their merit, ability and efficiency.

15. It appears from the record placed before us that after the formation of Andhra Pradesh for the first time on 2-8-1957 it was brought to the notice of the concerned Judges that all the persons included in the panel by the composite High Court of Madras in 1954 had received officiating appointments as Sub Judges. It was therefore found necessary to prepare a panel of six officers for appointment to the consequential and other vacancies that were expected to arise of officers fit for appointment as Sub Judges "in the Andhra area". Ten names of District Munsifs of Andhra area were put up for consideration.

16. On the same date, before another two learned Judges and the learned Chief Justice, a note was put up separately in regard to Telengana area. The note pointed out that it became necessary to draw up a panel of six officers for promotion as Sub-Judges-cum-District-Magistrates "in the Telengana region". Some names were proposed for consideration. The note further pointed out that the Munsif-Magistrates mentioned therein "are seniors in the integrated lists of last acting Sub Judge in the Andhra area. They are juniors to the last acting Sub-Judge in the Telengana area". It also appears from the minutes of one of the learned Judges that the Sub Judges' posts in the Telengana area were treated as selection posts.

17. On 22-11-1957 a further panel of officers fit for promotion as Sub Judges was prepared. The note pointed out that all the seven officers in the panel selected "from the Andhra area" in August last were posted as Sub Judges and therefore it had become necessary to draw up a further list of officers. As nine permanent vacancies in the posts of Sub Judges were to arise in the Andhra area alone during 1957-58, the names of 14 officers all from the Andhra area were put up for consideration and were considered and a panel prepared from amongst them.

18. On 13-9-1958 as out of 10 officers selected in November 1957 six were already promoted as Sub Judges and four were awaiting postings and as more vacancies were likely to be caused it

was proposed to select some more officers from the "Andhra Personnel" mentioned in the note. Panel was accordingly prepared.

19. On 1-10-1959 a fresh panel was drawn up for promotion as Sub Judges from Andhra District Munsifs.

20. On the same date a separate note in regard to Telengana Munsif-Magistrates was put up. The note pointed out that the 21 Munsif-Magistrates mentioned therein of the Telengana area had come up for consideration on the last occasion on 2-8-1957 when a panel of offi-cers fit for appointment as Sub Judges was drawn up "for the Telengana area".

21. On 18-4-1961, two separate lists of officers, one of the Andhra and the other of Telengana region were put up for consideration for the purpose of preparing a panel for promotion as Sub Judges. Separate panels seem to have been prepared on 6-8-1963. Likewise two separate lists of officers belonging to the two regions were put up for the purpose of preparation of panel of officers for appointment as Sub Judges.

22. It is at this stage that the Telengana Munsif-Magistrates appeared to have made a representation to the High Court bringing to their notice their grievances in regard to promotion as Sub-Judges. It appears from the note submitted on their representation to the High Court by the office that after the reorganisation of the States on 1-11-1956 the services of Andhra and Telengana officers in the respective categories were integrated and a combined seniority list for each category was drawn up with reference to the dates of continuous service in that category. The combined gradation list of District Munsifs and Munsif-Magistrates consisted of 137 officers. The note further stated:

> "The vacancies in the category of Sub Judges arising immediately after 1-11-1956 were filled up by re-promoting Andhra and Telengana Munsifs who acted as Sub Judges prior to 1-11-1956 but were under reversion on that date for want of vacancies. The subsequent vacancies were filled up from the panel of Andhra District Munsifs fit for promotion as Sub Judges already prepared in 1955 i.e. before the formation of Andhra Pradesh: After exhausting this panel, fresh panels were prepared from time to time for Andhra and Telengana Officers. The last Telengana Officer who was officiating and was being reverted for want of vacancies immediately prior to 1-11-1956 was first appointed in 1939 and further selections were made from among his juniors. So also the last Andhra Officer promoted by 1-11-1956 was first appointed in 1948 and further selections were made from among his juniors. So far 49 officers have been promoted as Sub Judges after 1-11-1956 in addition to the promotion of reverted Sub-Judges (3 Andhra and 1 Telengana). Out of these 49 fresh promotions, 40 are Andhra and 9 Telengana Officers. In the list so far drawn up Telengana Officers appointed upto 1947-48 are included and Andhra Officers so far included were first appointed in 1956. All the Telengana Munsifs were appointed between 1941 and 1954 and are seniors to those Andhra Officers appointed as District Munsifs in 1956 from among whom the selection is now being made."

23. It is not clear as to what decision was taken by the High Court on the above said representation.

24. For the first time, however, on 24-6-1966 a combined list of officers belonging to both the regions came up for consideration and it is from this combined list selection seems to have been made and a panel prepared for the purpose of promotion from District Munsifs and Munsif-Magistrates to the posts of Sub-Judges. The panel, however was prepared on the basis of selection.

25. On 20-4-1967, the suitability for promotion as Sub Judges of certain Munsif-Magistrates who were overlooked on the last occasion, that is, on 24-6-1966. again came up for consideration before the Hon'ble Judges.

26. On 22-9-1967, a fresh panel of District Munsifs considered fit for promotion as Sub-Judges was prepared. While preparing this panel, combined seniority list was considered and a panel was prepared on the basis of selection.

27. What emerges from the above is that from the date of formation of Andhra Pradesh till the Munsif-Magistrates made representations to the High Court, promotions were firstly made of those who were actually working as Sub Judges but were about to be reverted for want of vacancies in both the regions separately. Secondly the regional lists prepared prior to 1-11-1956 were followed for some time. Thirdly till 1966 promotions were made to the posts of Sub Judges on the basis of separate lists of District Munsifs in Andhra area and Munsif-Magistrates in Telengana area. Although it is not clear, it seems that promotions from the Andhra lists were made to posts falling vacant in Andhra area and likewise promotions were made to vacancies caused in Telengana area from the lists of Telengana Munsif-Magistrates. Fourthly, after preparing panels separatly for Telengana area on 2-8-1957 no fresh panel was prepared for Telengana area till 1-10-1959. Fifthly separate panel for Telengana area seems to have been made from time to time keeping in view the vacancies in that area. And finally although the combined provisional list of seniority was published on 12-9-1957, it was never followed, nor promotions made "out of seniority" during the integration of services were adjusted.

28. Although it was a common ground in so far as arguments went that in making the promotions to the posts of Judges a ratio of 2:1 i.e. 2 for Andhra and 1 for Telengana was followed, but from the record referred to above it does not appear that any such ratio was either determined by the High Court or was in practice followed. The promotions actually made may have accurately worked out at that ratio or sometimes even as 4:1. But from the record brought to our notice, however, no such decision appears to have been taken by the High Court prescribing any ratio for the purpose of such promotion. It is, however, pertinent to note that the petitioners alleged in their petition that a formula of 1:2 appears to have been adopted which ignored the seniority list keeping in view the ratio alone. This allegation has not been squarely met. When attention to this omission was invited, the learned Government Pleader appearing for the the High Court stated that such a ratio was in fact followed.

29. It is in these circumstances that we have to consider whether the promotions so made by the High Court were valid and if found to be invalid what is the relief which can be granted to the petitioners. It is not doubted that the High Court acted *bona fide* and in good faith. The question,

however, remains as to whether the manner in which the promotions were made was valid.

30. The contention in that behalf was that the post of Sub Judge is a selection post and therefore the High Court was right in selecting persons found to be fit to hold that post. Reliance was placed on Rule 4(3) and (4) of the Special Rules for the Andhra Pradesh State Judicial Service. These Rules were issued in G. O. Ms. No. 2207 dated 4-12-1962. They have, however, been given retrospective effect from 1-4-1958. According to the said Rule, the posts of Sub Judges shall be filled by promotion from District Munsifs and all promotions shall be made on ground of merit and ability seniority being considered only where merit and ability are approximately equal. Two separate Rules were however in vogue till 4-12-1962 when the new Rules came into force and were given retrospective effect, one in the Andhra region and the other in Telengana. It, is however relevant to note that equation of posts and integration of services together with preparation of a common seniority list has to be considered according to the situation prevailing on 1-11-1956. In any case, from November 1956 to 1-4-1958, from which date the new Rules came into effect, two separate sets of rules were in vogue under which promotions were to be made. It became therefore necessary for us to examine as to whether according to the Hyderabad Judicial Service Rules, promotion to a Sub Judge's post was to be made by selection.

31. The Hyderabad Judicial Service (Recruitment) Rules, 1952 were framed in exercise of the powers conferred by Article 234 of the Constitution of India after consultation with the Hyderabad Public Service Commission and with the High Court of Hyderabad. According to Rule 3. the judicial service shall consist of Sub-Judges and Munsifs. Rule 4 lays down the manner of appointment to both the said categories of officers. Sub Judges were to be appointed by promotion from Munsifs. All the subsequent Rules relate to the recruitment by competitive examination of Munsifs.

32. In exercise of the powers conferred by the proviso to Article 309 of the Constitution, the Rajpramukh made some Rules by a notification No. 299/GAD SRC/19-Home/52 dated 20-1-1955. According to these Rules, District and Sessions Judges' posts were declared as selection posts and appointments to the said posts were to be made by the Rajpramukh in consultation with the High Court under Article 233. Class I Senior scale posts were to be filled by promotion from the Munsifs.

33. It appears from another notification dated 20-1-1955 that certain posts were declared as selection posts, in which lists of posts. Sub Judges and District Magistrates for Districts posts do not appear. They appear under the heading of "senior scale posts."

34. It is from these Rules that it was argued by Sri Upendralal Waghray, the learned counsel for the petitioners, that the Sub Judges' posts in Hyderabad were not selection posts but were promotion posts.

35. It was, however, contended by Sri P. Rama Chandra Reddy, the learned Government Pleader, that the Rules made in 1955 were made under Article 309 and not under Article 234 of the Constitution. These Rules according to him therefore were invalid. Secondly it was contended that even if those Rules are valid, the method of promotion from Munsifs to Sub Judges' posts is not laid down and therefore the High Court was quite competent to evolve a method to make such promotions and it is under that method that the promotions were made.

36. What is, however, ignored in advancing this argument is that under the Rules of 1952 which are made under Article 234 after consultation with the High Court and the Public Service Commission, the appointments to the category of Sub Judges according to the Rules are to be made by promotion from Munsifs. The term 'promotion' and the term 'selection' are used in the Rules in distinctly two different senses. While the selection involves the consideration of merit and ability and not merely of seniority, whereas promotion would ordinarily mean promotion on the basis of seniority unless of course the record of the officer is too bad to consider him for promotion. It is true that the promotion can be made on the basis of merit and ability, but it also can be made on the basis of seniority. If the Rules had not made distinction between selection posts and posts to be filled by promotion it was perhaps possible to contend that the use of the term 'promotion' alone would not necessarily mean promotion by seniority. It may mean promotion on merit and ability. In that case it would have to be considered whether in the absence of any rule prescribing the method of promotion, that is, whether on the ground of merit and ability or on the basis of seniority, the High Court would be competent to evolve its own method of promotion in the absence of any rule made in that behalf under Article 235 read with Article 309. We are, however, clear that under the Rules of 1952 Sub Judges' posts are to be filled and we are told were being filled by promotion from Munsifs on the ground of seniority which would mean that Sub Judges' posts were treated as stage higher than the Munsifs' posts and rise to that post was on the basis of seniority which did not involve any selection. That conclusion finds full support from the two notifications of 20-1-1955 referred to above.

37. That apart, we do not think that the two notifications of 20-1-1955 are invalid because they were issued under the proviso to Article 309 and not under Article 234. These notifications do not, in our view, fall within the purview of Article 234 but fall within the ambit of Article 235 read with the proviso to Article 309.

38. Chapter VI of the Constitution consists of 5 Articles, 233 to 237. The last Article merely provides for the application of the provisions of that Chapter to Magistrates in the State as they apply in relation to persons appointed to the judicial service of the State subiect however to such exceptions and modifications as may be specified. The expression 'Judicial Service' is defined in the preceding Article 236 (b) and it means service consisting exclusively of persons intended to fill the posts of District Judges and other civil judicial posts inferior to the posts of District Judge. The three Articles, viz., 233 to 235 are more important and relevant for our purpose. While Article 233 relates to the appointment of District Judges, the only point which must be noted in that Article is that the Article uses the terms 'appointments, postings and promotions of District Judges.'

39. Article 234 according to the marginal note relates to recruitment of persons other than District Judges to the judicial service. The body of the Article, however, does not use the word 'recruitment' but uses the words 'appointment'. We are, however, clear that the word 'appoint' means initial appointment, that is recruitment and not promotion from one lower cadre to another higher cadre. Under that Article the appointments are to be made by the Governor of the State. But such appointments shall be made by him in accordance with the Rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court. If the word 'appointment' is to be understood as including promotion also, then such promotion according to that Article shall have to be made by the Governor. But admittedly promotions to

the posts of Sub Judges were made by the High Court and not by the Governor. If the posts of Sub Judges were to be filled by recruitment and not by promotion, then under that Article the recruiting authority would be the Governor, although the Rules for such recruitment would be made by the Governor in consultation with the High Court and the Public Service Commission. It is however, a common ground that appointments to the posts of Sub Judges are not made directly like District Munsifs but are made by promotion from the cadre of District Munsifs. Such promotions may be on merit and ability or may be made by way of promotion.

40. It is because of this that we find both in the Rules of the Hyderabad made under Article 234 as well as in the Rules now made by the Andhra Pradesh under the same Article a distinction being made between initial appointment of District Munsifs and the promotion of the District Munsifs to the posts of Sub Judges. We have already referred to the Hyderabad Rules making such distinction. The Andhra Pradesh Rules now in vogue also make the same distinction. The term 'appointed to the service' is defined in Rule 2(2). According to it, a person is said to be appointed to service when he discharges for the first time the duties of a post borne on the cadre of the service or commences the probation prescribed for members thereof. The term 'promotion' according to Rule 2(14) means the appointment of a Judicial Second Class Magistrate as a District Munsif or the appointment of a District Munsif as Sub Judge by the High Court, in accordance with the said Rules.

41. Rule 4(1) and (2) relates to the appointment to the category of Judicial Second Class Magistrates and District Munsifs respectively, whereas Rule 4(3) declares that the posts of Sub Judges shall be filled by promotion from District Munsifs and sub-rule (4) lays down that all promotions shall be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal.

42. It will thus be plain that any contention that the term 'appointment' used in Article 234 does not only mean initial appointment to a cadre or recruitment as the marginal note itself suggests but includes promotion also from one cadre to the other cadre would not be correct. Such a contention if accepted would take away the power of promotion which now vests in the High Court according to Article 235 and Rule 2 (14) of the present Rules and it would then remain with the Governor under Article 234 although he may make such appointments in accordance with the Rules made in consultation with the High Court and the Public Service Commission.
43. That such a construction is incorrect would be seen from Article 235 also. That Article relates to control over subordinate Courts. It declares that the control over the District Courts and Courts subordinate thereto including the posting and promotion etc. of the persons belonging to the Judicial service and holding any post inferior to the post of District Judge shall be vested in the High Court. It clearly means that the promotion of a District Munsif to the post of a Sub Judge vests in the High Court because the term 'control' includes the promotion also. It is because of this Article that Rule 2(14) states that such promotion shall be given by the High Court. Otherwise such a provision in the Rules would be inconsistent if the promotions are included in Article 234 as is contended by the learned Advocate appearing for the Respondent. According to Article 234, we have already noticed that if promotions are included in the term 'appointment' appearing therein, it would be the Governor who would be entitled to make promotions and not the High Court. It would not be possible to read into Rule 2(14) any delegation of such power by the Governor to the High Court. It is not therefore necessary to examine whether the power of appointment vested in the Governor under Article 234 can be delegated to the High Court or to

any other authority. The true position, however, is that while Article 234 applies to initial recruitment wherever they are made to the posts of judicial service inferior to the post of District Judges, in cases of promotion from the posts of Judicial Second Class Magistrates to the posts of District Munsifs or from the posts of District Munsifs to the posts of Sub Judges, it is Article 235 that would apply and it is the High Court which is vested with the power of effecting such promotions.

44. That this conclusion is correct would further be seen from the language used in regard to the procedure in making the Rules by the Governor. Article 234 lays down that the appointments referred to therein shall be made in accordance with the Rules made by the Governor in that behalf and made after consultation with the Public Service Commission and the High Court. Thus not only the appointing authority is the Governor under that Article but he is also the Rule making authority in that behalf, that is to say, to make Rules in regard to the recruitment of persons other than District Judges to the judicial service. Such Rules, however, cannot be made by the Governor without consulting the Public Service Commission and the High Court. Whereas the Rules referred to in Article 235 although have to be made by the Governor under the proviso to Article 309 the said Rules need not be made in consultation with the Public Service Commission and the High Court. The control which vests in the High Court under Article 235 and which includes promotion is made subject to the condition that it does not thereby authorise the High Court to deal with the persons belonging to the judicial service and holding posts inferior to the posts of District Judges otherwise than in accordance with the conditions of his service prescribed under the law regulating the conditions of his service. The law regulating the conditions of service indisputably has a reference only to the law referred to in Article 309. It empowers the appropriate Legislature to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of any State. The proviso empowers the Governor to make Rules regarding the recruitment and the conditions of service of persons appointed to such service and posts until provision in that behalf is made by or under an Act of the appropriate Legislature.

45. It is true that Article 309 is made subject to the other provisions of the Constitution and in so far as it is relevant for our purpose it is Article 234 which would govern Article 309, the result of which is that while the Rules in regard to the recruitment of the persons other than District Judges to the Judicial service are to be made by the Governor in accordance with Article 234 in consultation with the Public Service Commission and the High Court, control over subordinate courts including promotions vesting in the High Court would be exercised in accordance with the law regulating the conditions of such service and until such a law is made under Article 309 by the Rules made by the Governor regulating the conditions of such service. What must follow is that the promotions in subordinate judicial service as above can be made by the High Court in accordance with Rules made by the Governor under the proviso to Article 309. Such Rules, according to Article 309 need not be made by the Governor in consultation with the Public Service Commission or the High Court. Consequently, notifications issued by the Government of Hyderabad on 20-1-1955 under the proviso to Article 309 declaring Sub Judges' posts as non-selection or promotion posts cannot be said to be invalid because it is not made in accordance with the terms of Article 234.

46. In *High Court of Calcutta v. Amal Kumar*[1]*, it is recognised that under Article 235* of the Constitution the High Court is the authority which has the power of promotion in respect of

persons belonging to the State Judicial Service holding any post inferior to that of a District Judge. By Article 235 the High Court has been vested with complete control over the subordinate courts. It is also pertinent to note that this decision considered the Rules made relating to promotion under Article 309. This decision therefore supports the view which we have taken both in regard to the question of promotion that it falls within Article 235 and in regard to law referred to in Article 235 as the one coming under Article 309 and not Rules made under Article 234.

47. There is nothing which can be said to be inconsistent with the view which we have taken in the case of *State of West Bengal v. Nripendra Nath*[2].

48. The ancestor of Article 234, that is Section 255(1) of the Government of India Act, 1935, had laid down that the Government shall after consultation with the Public Service Commission and the High Court make rules defining the standards of qualifications to be attached by persons desirous of entering the Subordinate Civil Judicial Services of a province. And the ancestor of Article 235 viz., Section 255 (3) used the same language when it says that it would not authorise to deal with any such person otherwise than in accordance with the conditions of service prescribed by the provisions of the Chapter in which that section occurred. This history of Articles 234 and 235 lends considerable support to our view.

49. It is true that in *Kesava v. State of Mysore*[3], Pad-manabhiah, J. observed that:

> "The word 'appointment' does not necessarily mean fresh appointments directly from the Bar. Appointments referred to in Article 234 must be intended to include appointments by direct recruitment and also appointments by promotion."

The other learned Judge, who wrote a separate judgment did not deal with this question. With due respect to the learned Judge, we find ourselves unable to agree with the said

[1] AIR 1962 SC 1704
[3] AIR 1956 Mys 20
[2] AIR 1966 SC 447

observation. The learned Judge did not give any reasons to reach that conclusion nor did he consider the several Articles of the Constitution to which we have made reference. Nor did he consider the Rules similar to the one to which we have made reference.

50. It is thus clear that the position of law in regard to the promotion from the post of District Munsif to the post of Sub Judge was different in the two regions until the special Rules for Andhra Pradesh State Judicial Service were made in 1962 with retrospective effect from 1958. According to Hyderabad Rules, such promotions were to be made on the basis of seniority and in the Andhra region on the basis of merit-cum-ability. This method ought to have been followed in regard to the two regions according to the rules governing them. That was possible only when the provisional integrated seniority list which was prepared in 1957 was scrupulously followed. We do not experience any difficulty in following such a list. Keeping in view the common list promotions of Telengana personnel could have been made on the ground of seniority whereas the promotion of Andhra Personnel could have been made on the ground of merit-cum-ability, seniority being considered when merit and ability are approximately the same. Admittedly this course was not at all followed and till 1966 separate promotions as narrated above were made in

the two regions based purely on selection and not on promotion in regard to Telengana Officers.

51. It is not doubted that if the conditions of promotion from the post of District Munsifs to the post of Sub Judge in regard to the protected employees are altered to their disadvantage prior permission from the Government of India ought to have been obtained according to the proviso to Section 115(7) of the States Reorganization Act. It was not disputed that adopting the method of selection discarding the mode of promotion on the basis of seniority is an alteration made in the conditions of promotion of protected employees adversely affecting them. It was conceded that before Rule 4(3) and (4) was introduced in the present Rules, no permission under the proviso to Section 115(7) of the States Reorganization Act was obtained from the Government of India. The said rule or the promotions made therefore are invalid and not effective as against the protected employees in so far as their first promotions were concerned.

52. The proviso to Section 115(7) of the States Reorganization Act lays down that the conditions of service applicable immediately before the appointed day (1-11-1956) to the case of any person referred to in sub-sec. (1) or (2) of Section 115 shall not be varied to his disadvantage except with the previous approval of the Central Government. No such permission was obtained. Therefore the rule prevalent on 1-11-1956 in regard to their promotion could not have been varied without such sanction. We are supported in our view by the following two decisions of the Supreme Court C. A. No. 811 of 1968 decided on 15-4-1968 (SC) and CA. No. 409 of 1968 decided on 9-4-1969 : (reported in AIR 1970 Supreme Court 143). We took a similar view in W. As. Nos. 324 and 436 of 1969 decided on 14-11-1969 (SC) and in W. A. Nos. 441 and 442 of 1969 decided on 18-12-1969 (SC).

53. The promotions so made are also bad because there has been violation of Articles 14 and 16 of the Constitution of India. It is well settled that equality of opportunity in matters relating to employment or appointments guaranteed by Article 16(1) is wide enough to include all matters relating to employment both prior and subsequent such as the initial appointment, promotions etc., Equality of opportunity would include promotion to selection posts as well as to the promotion posts on the basis of seniority. Equality of opportunity in the matter of promotion would naturally mean that all employees holding posts in the same grade shall be equally treated. Once different employees belonging to two different regions are admitted into a single grade or unit of employment, it would not be admissible to provide different treatment between the two sections of opportunity for promotion as between officers holding different posts in the same grade would be an infringement of Article 16, as between officers holding posts in different grades there can be no question of equality of opportunity. In other words such equality of opportunity, must mean equality as between same class of employees and not equality between members of separate independent classes. Such equality of opportunity stems from the recognition in the Constitution that all persons in the service similarly situated are entitled to an equal opportunity not only in the matter of appointment, but in promotion and other conditions of service. If the advancement of an officer in the same service is impeded or retarded by a rule or action which is found to be unjust or unreasonable in so far as it results in unequal treatment and preference to one class in the same service as against another it would be open to attack under Article 16 of the Constitution. What emerges from the above is that where two sets of persons belonging to two regions are brought together and a unified cadre is created, then in matters relating to promotions from a lower cadre to a higher post they must satisfy the requirements of equality of opportunity guaranteed by Article 16 of the Constitution.

54. The District Munsifs and the Munsif Magistrates' posts were integrated into a common service and a provisional list of their seniority was prepared in 1957. When the source for promotion was thus common with a common gradation list it would be unconstitutional to accord different or separate treatment to officers belonging to the two regions. There was no question of any quota being reserved for any region or any ratio prescribed between the two sets of officers after they were combined into a common list. It is abundantly plain that by adopting the method of region-wise promotions large number of Andhra officers were as a result selected to fill the posts which fell vacant in Andhra area and as few vacancies had occurred in Telengana area, comparatively few officers from Telengana area were promoted thus causing a big gap between the two sets of officers the ratio reaching more than 4:1. Thus whether regionwise method was followed or the method of promotion on the basis of ratio of 2:1 was followed as was conceded before us in either case it placed in the result some members of unified cadre in a more advantageous position as against the others. Such a treatment is clearly violative of the fundamental rights guaranteed by Article 16. The High Court could not have in law, adopted a method which in the result operated to the prejudice of some members in the same cadre. The basis thus adopted is not approved by the Rules, and is not permissible under the Constitution. The High Court was bound to treat the Andhra Pradesh State as a whole and as one unit and make the promotions on the basis of the provisional and final lists which were prepared and in accordance with the rules governing the officers in matters relating to their promotions irrespective of the fact where and in what region the vacancy had arisen.

55. In *Ramaswamy v. I. G. of Police Mysore*[4], the facts were: Under the provisions of the Hyderabad District Police Act some Sub Inspectors of Police were after the interview by

[4] AIR 1966 SC 175

the Board put on the eligibility list for the post of Circle Inspectors prepared before the States Reorganization Act came into force. As a result of the reorganization, some of the Sub-inspectors who were in the eligibility list were transferred to the State of Mysore and were promoted on ad hoc basis to the posts of Circle Inspectors because the permanent incumbents had either gone on leave or were on deputation. On their return, the ad hoc Circle Inspectors were reverted to their substantive posts of Sub-Inspectors. It was contended by them that they could not have been reverted without first reverting others who were juniors to them and that their reversion amounted to reduction in rank.

56. It appears that eligibility lists were received in the new State from all the States from which areas had been transferred to the new State. These lists continued to be acted upon as and when vacancies arose in the cadre of Circle Inspectors. Pending integration, promotions were made from these eligibility lists ad hoc or as they were called 'out of seniority' and continued to be made pending integration. Eventually a provisional integrated seniority list of all Sub-inspectors was prepared in 1958. In 1962 when senior Circle Inspectors returned from deputation, some officiating circle inspectors were reverted. They filed writ petition in 1962 contending that even though they had been promoted later, they could not have been reverted in view of their position in the provisional list and that that list should have been adhered to and those juniors to them in the provisional list although promoted earlier should have been reverted. This contention was accepted by the High Court and in consequence reversions were made in accordance with the provisional list. The Supreme Court in regard to this decision of the High Court observed:

> "We can see nothing in Law which prevents the State Government from proceeding according to the provisional list after such list was prepared. We are of opinion that the view taken by Mysore High Court in the earlier Writ Petitions after the framing of the provisional seniority list is correct and the State Government would be entitled to act on that list subject of course to this that if the provisional list is in any way altered when the final list is prepared, the State Government would give effect to the final list. The contention of the petitioners that the State Government should have continued to make promotions and transfers regionwise only even after the provisional list was made, therefore must fail. It may be added that the State Government would be entitled and bound after the appointed day to treat the State as one whole unit and make such orders of transfer as it thought fit, treating the whole State as one unit." What is clear from this decision is that till the provisional list is prepared, it may be permissible to effect promotions on the basis of regional list prepared prior to the reorganisation of State, but such promotions would be ad hoc, and would have to be later on adjusted according to the provisional list. Once the provisional list, however is made the State or the High Court, as the case may be, is bound to treat the whole State as one unit and must thereafter make promotions strictly in accordance with the provisional list. After the final list is prepared, the State or the High Court as the case may be, would give effect to it and adjust the interim and provisional promotions made during the course of integration of services in accordance with the final list.

57. In *Mervyn Continho v. Collector of Customs Bombay*[5], and *Roshan Lal v. Union of India*[6], it was held that recruits from both the sources once integrated into one no discrimination thereafter can be made in favour of the recruits from one source as against the recruits from the other source in the matter of promotion. Once the direct recruits and promotees are absorbed in one cadre, they form one class and they cannot be discriminated for the purpose of further promotion to the Higher grade. The source of promotion when only one there can be no question of any quota being reserved, from two sources. If any such basis is adopted, it would amount to denying the equality of opportunity under Article 16 of the Constitution, *Punjab State v. Lekh Raj*[7], takes the same view. We have also in Writ Appeal No. 170 of 1967 (Andh Pra) taken a similar view.

58. We have therefore no doubt that the method of promotion adopted by the High Court was not only inconsistent with the prevailing Rules and was also inconsistent with proviso to Section 115 (7) of the States Reorganization Act, but also violated Article 16 of the Constitution. The promotions therefore thus made were invalid.

59. Even assuming that the post of a Sub-Judge is a selection post even in the case of Telengana area, even then the method by which promotions were made would be violative of Article 16 of the Constitution. We have been supplied with a statement which indisputably shows that the petitioners' cases were not considered on more than one occasion although they were entitled to be considered and it is obvious that if without considering their cases promotions were given to their juniors, then such promotions would be invalid as far as they are concerned. In the present case as pointed above, although selection was the mode adopted but promotions were made separately for Andhra and Telengana regions without treating the State as a single unit.

Promotions on this basis also would therefore be bad.

60. The only thing which now remains for consideration is as to what relief can be granted to the petitioners who as seniors should have been promoted much earlier than the respondents but were denied their right and were promoted subsequently.

61. In such cases, it is now fairly settled that the High Court in exercise of the powers under Article 226 would not itself adjust the seniority list according to the principles laid down above but would ask the authority concerned to adjust the promotions in accordance with the final list and in the light of the law discussed above. In case the High Court fails to bring the seniority list of Sub-Judges in accordance with the above it may perhaps be possible for this court to effect promotions and adjust the seniority list with a view to bring it into accord with the final common gradation list. That this is so is seen from the following decisions.

62. We have already noted the decision reported in AIR 1966 Supreme Court 175 where although promotions of juniors were earlier made, when the question of reversion came in the High Court and the Supreme Court approved of the reversions strictly in accordance with the provisional list prepared under Part X of the States Reorganization Act. When reversions can be made on this basis it is obvious that the adjustment of seniority list in

[5] AIR 1967 SC 52

[6] AIR 1967 SC 1889

[7] AIR 1969 Pun 337

accordance with the final common gradation list must have to be made.

63. AIR 1967 Supreme Court 52 at p. 57 permits such a direction whereby the seniority will be determined in the manner decided by the Court.

64. In *State of Mysore v. Syed Mahmood*[8], after finding that the promotion of all junior statistical assistants ranking below the seniors who were promoted without the cases of the seniors being considered were irregularly made, the Supreme Court held:-

> "In the circumstances the High Court issue a writ to the State Government compelling it to perform its duty and to consider whether having regard to their seniority and fitness they should have been promoted on the relevant dates when officers junior to them were promoted."

It was further observed in paragraph 5:

> "We are of the opinion that the State Government should be directed at this stage to consider the fitness of Syed Mahmood and Bhao Rao for promotion in 1959. If on such examination the State Government arbitrarily refuses to promote them, different considerations would arise. The State Government would upon such consideration be under a duty to promote them as from 1959 if they were then fit to discharge the duties of the Higher post and if it fails to perform its duty, the Court may direct it to promote them as from 1959."

65. To the same effect is another decision of the Supreme Court in Civil Appeal No. 1004 of 1966 decided on 7-4-1969 reported in Notes of Supreme Court Cases, page 16.

66. In the light of these decisions, this Court can direct the High Court to consider the fitness of the petitioners for their promotion on the dates when juniors to them were in fact promoted. The High Court would upon such consideration promote them as from the dates when they were entitled to be so promoted according to the Rules governing them. We have no reason to suppose that the High Court will not consider and decide their cases in the light of what is stated above. We cannot therefore without providing an opportunity to the High Court proceed to decide their places in the seniority list of Sub-Judges.

67. It was however, contended by the learned Advocates appearing for the respondents that there has been enormous delay on the part of the petitioners to approach this Court. The petitioners therefore are not entitled to a writ, the issue of which is discretionary.

68. In any limitation on the powers of a Court to issue a Writ is asserted, such a limitation would be found either in the broad principles which govern the issue of writs in England or the limitations contained in Article 226 or the limitations contained in the other provisions of the Constitution. However, in India, as in England, there are certain limitations which the Courts have put on themselves because the remedies provided by the writs are extraordinary remedies. The Courts will not ordinarily issue a writ in favor of a person who is guilty of delay which is unexplained. The cases dealing with delay or

[8] AIR 1968 SC 1113

laches, however, are not consistent nor do they indicate any coherent pattern. There are cases in which it has been held that delay may be a ground for refusing relief, but in which delay has been condoned, the Court indicated its displeasure by making no order as to costs. No hard and fast rules, however, can be laid down in this behalf. It is a matter which has to go into consideration as the remedy is discretionary. If the delay is properly explained or there are circumstances in which the question of delay would not assume importance, the delay would not be permitted to stand in the way of the exercise of the power under Article 226 and thereby affecting fairness and justice. It has been said in some cases that relief cannot be refused on the ground of delay where fundamental rights are concerned. It is in this background that we have to consider whether there has been delay, and if there has been delay, whether it has been properly explained.

69. The petitioners made representation to the High Court in 1964. The High Court thereafter started making promotions on the basis of the provisional and final lists from 1966 onwards. It was proper for the petitioners to have approached the High Court first and leave the decision of their grievances to the High Court. Although the High Court redressed one of their major grievance of not following the provisional list and depriving them of their fundamental right, the High Court did not read just the seniority list with a view to bring it in accord with the law in force. It is only after waiting for some time that the petitioners have come to this Court by way of this Writ Petition. It is not clear from the record whether any reply was given by the High Court to the petitioners after considering their representation. It cannot be in doubt that time spent in proper departmental representations or proceedings is a good ground to condone the delay.

70. It is evident from their petition that they are not challenging the further promotion which some of the respondents have earned as District Judges. They had also been fair in not asking for any other relief against the other respondents who still continue to be Subordinate Judges and before whom the petitioners ought to have been promoted. What all they are asking in the writ petition is to re-adjust the seniority list of Sub Judges reflecting the true position of law and showing as if promotions were made in accordance with the provisional and final lists. The list of subordinate Judges was not before us. We are not sure as to when it was made. It is, however common knowledge that the list is subject to changes as and when such changes are called for. The ad hoc or out of seniority promotions made during the integration of services, it is already seen have to be adjusted in the light of the final list. The final list was published in the later part of the year 1966. It is only after the grievances of the petitioners were not fully redressed that they have approached this Court. The position in which the Subordinate Judges are placed and in the circumstances of the case, we do not think that this is a case which should be dismissed merely on the ground of delay. It is difficult to hold the petitioners guilty of laches. Any refusal to redress their grievance even to the extent they are now asking would only mean perpetuation of injustice which has already been caused to them and we do not think the High Court would like to take such a view. It involves not ordinary rights of seniority but as seen above involves questions of fundamental rights and it would be in the fitness of things that the seniority list is adjusted in the light of what is stated above. After all the next stage of promotion is to the posts of District Judges which promotion can be earned only on the basis of merit-cum-ability. Whatever may be the place of a Sub Judge in the common seniority list, while effecting promotions all deserving cases have necessarily to be considered. In these circumstances, we do not think that we can give effect to the contention based on the ground of delay.

71. In a petition for certiorari where the order in this case the promotions ordered complained of is manifestly erroneous or without jurisdiction or affects fundamental rights, this Court would be loath to reject the petition simply on the ground of delay. This is so particularly when there are no means for the petitioners to really know as to on what basis promotions were made and as to why they were not promoted. In the context it should not be forgotten, that they are subordinates to the High Court in administrative matters and usually they would not like to rush to the Court unless of course they are in possession of facts which compel them to adopt this course. This is not a case where because of the delay third parties' interests have intervened or the persons now affected would be placed in a position where they would not have been placed if delay was not caused in prosecuting the petition. No inconsistent legal or equitable situation has arisen because of delay or laches on the part of the petitioners which cannot be ignored. The Court cannot be precluded from rectifying an injustice simply because the petitioners did not move in the matter earlier.

72. It was contended by Sri P. A. Chowdary, the learned counsel for the respondents, that the petitioners are not members of the judicial service at all. His contention was that when they were appointed during the time when H. E. H. the Nizam was the Ruler, they were his personal servants and after the Police action when Hyderabad became part of India, H. E. H. the Nizam lost his powers and along with him all the members of the judicial service would be deemed to have gone. Although there was subsequently Government of Hyderabad which was a part B State under the Constitution, that State also was abolished and consequently the petitioners along with the other members of the judicial service would be deemed to have ceased to be government servants. If at all they were entitled to be added only after all the members of the Andhra Judicial

Service are included in the seniority list. We do not find any substance in this contention. It is not, in our view, necessary to deal with the several steps showed in the argument. It is enough to say that Part X of the States Reorganization Act gives power to the Government of India to allot the employees of the former Government of Hyderabad to the reorganized States. In exercise of such power, the members of the judicial service were allotted as is mentioned above to the State of Andhra Pradesh Judicial Service. In exercise of the powers under Section 115 of the States Reorganization Act, the provisional and final lists were prepared in which the petitioners ranked very much senior to the respondents. It is therefore futile to argue that they are not members of the judicial service or even if they are, they have to rank below the members of the judicial service from Andhra. Any such argument can be advanced only completely ignoring Part X of the States Reorganization Act.

73. We are also not impressed with the argument advanced by some of the respondents that they were not served with the provisional list which would have enabled them to put forth their grievances. We have already noticed from the record that the names of the respondents were included in the provisional list only after 1-11-1956 and after the inclusion of their names the list was served upon them. It is curious that in the face of this record, they should have chosen to raise such a plea.

74. Since no other contention was raised, we would allow the writ petition and issue a Writ of mandamus directing the High Court to consider the cases of the petitioners in the light of what is stated above for the purpose of re-adjusting the common seniority list of sub-judges. In the circumstances of the case, however, we leave the parties to bear their own costs. Advocate's fee Rs. 100/-.

Petition allowed.