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## STATE OF BIHAR

v.

MADAN MOHAN PRASAD &amp; ORS.

December 19, 1975

B [A. N. RAY, C.J., M. H. BEG, R. S. SARKARIA AND P. N. SHINGHAL, JJ.]

*Bihar Superior Judicial Service Rules, 1951—r. 16(e)—“may have been allowed to officiate continuously”—Scope and meaning of—Notional officiation—If permissible.*

*Constitution of India—Art. 235—Power of determining seniority of District Judges—If vests in the High Court.*

C Rule 6 of the Bihar Superior Judicial Service Rules, 1951, says that of the posts in the cadre of the service, two-thirds shall be filled by promotion and one-third by direct recruitment. Clause (e) of r. 16 provides that seniority of direct recruits *vis-a-vis* promoted officers shall be determined with reference to the dates from which they *may have been allowed to officiate continuously* in a post in the cadre of the Service.

D Respondents 1, 2 and 3 who were direct recruits were appointed as Additional District & Sessions Judges with effect from April 21, 1960. Respondents 4, 5 and 6 belonged to the judicial service of the State. Respondents 5 and 6 were promoted as Additional District & Sessions Judges. But despite the availability of a post from November 1, 1959, and suitability of respondent 4, he was appointed to that post only on September 19, 1960. His representation that his seniority should be fixed below that of respondent 6 was rejected by the High Court. But, the State Government said that in order to relieve undue hardship to respondent 4, he should be deemed to have been officiating as Additional District & Sessions Judge with effect from November 1, 1959 and that for the purposes of seniority he should rank immediately below respondents 5 and 6 on the view that, on a proper interpretation of r. 16(e) of the Rules, the Government was authorised to fix the seniority from *a date from which officiation was possible* on account of availability of vacancies.

E Respondents 1 to 3 (direct recruits) in a writ petition impugned the Government's action in fixing the seniority of respondent 4 below that of respondents 5 and 6 but above them. Before the High Court the State contended that the meaning of the expression “*might have been allowed to officiate continuously*” in r. 16(e) is that a notional, continuous officiation in a post in the cadre of the service or outside it, will give preference to the promoted officers in the matter of seniority over the direct recruits provided there were vacancies, in one of which he could or might have been allowed to officiate continuously. The High Court rejected this contention and held that this expression meant actual and continuous officiation and not a fictional or notional one.

F Dismissing the appeal,

G HELD : (1) (a) The words “*may have been allowed to officiate continuously*” in cl. (e) of r. 16 mean actual and continuous officiation and not a fortuitous or fictional officiation. A notional construction of the clause would lead to anomalous results. The State Government, therefore, could not, *on an interpretation of r. 16(e)* say that for the limited purpose of seniority respondent 4 would rank below respondents 5 and 6 but above the writ petitioners (respondents 1 to 3) and will be *deemed* to have been officiating as Additional District & Sessions Judges with effect from November 1, 1959. Such a deeming officiation for the purpose of determination of seniority on a construction of cl. (e) was not permissible. [117 H—118 B]

H (b) Reading cl. (e) together with cl. (a) and (b) of r. 16, it is clear that before fixing the seniority of direct recruits *vis-a-vis* promoted officers it will be necessary, as a preliminary step, to prepare two separate lists—one of direct recruits under cl. (a) and the other of promoted officers under cl. (b) of r. 16 in the chronological order of their confirmation. [117 D—E]

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(2) The power of confirmation of District Judges is a part of the power of control vested in the High Court under Art. 235 of the Constitution. Since the Bihar Superior Judicial Service Rules make the chronological order of confirmation an integral part of the process of fixation of the order of seniority in the service, the inference is that both these powers were intended to be exercised by one and the same authority. Since Art. 235 of the Constitution vests the power of confirmation in the High Court, the power of determining the seniority in the service is also with the High Court. In determining the seniority the High Court is bound to act in accordance with the rules validly made by the Governor under the proviso to Art. 309 of the Constitution. [117 E—G]

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*Chandramouleshwar Prasad v. Patna High Court and others*, [1970] 2 S.C.R. 666, followed.

*High Court of Punjab and Haryana etc. v. The State of Haryana and others*, [1975] 3 S.C.R. 365, distinguished.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1667 of 1970.

(Appeal by special leave from the judgment and order dated the 26-9-1969 of the Patna High Court in Civil Writ Petition Case No. 183 of 1968).

*L. M. Singhvi and U. P. Singh*

for the appellants.

*B. P. Singh*

for the respondent.

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The Judgment of the Court was delivered by

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SARKARIA, J.—Respondents 1, 2 and 3 herein made an application under Article 226 of the Constitution alleging that the decision of the Bihar State Government fixing the seniority of Respondent 4 below Shri C. P. Singh (Respondent 5) and Shri E. Rehman (Respondent 6) and above the applicants, in the cadre of Bihar Superior Judicial Service was illegal and *ultra vires*. They prayed for a writ of *mandamus*, direction or order quashing the same and directing the State Government to revise the applicant's seniority *vis-a-vis* the opposite parties, (Respondents 4, 5 and 6 herein).

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The applicants also challenged the upgrading of the posts of Deputy Registrar, Patna High Court and the Secretary, Bihar Legislative Assembly with effect from June 17, 1959 till the posts were held by Respondents 5 and 6, respectively.

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A Full Bench of the High Court partly allowed the writ application and quashed the order of the State Government placing Respondent 4 below Respondents 5 and 6 in seniority. The material facts were these :

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Respondents 4, 5 and 6 were appointed as Munsifs on the same date under one notification. On April 25, 1959, these three officers were holding the posts of Subordinate Judges. Prior to that date, four posts of Additional District and Sessions Judges fell vacant. On April 25, 1959, the High Court, after considering the service records of the Subordinate Judges due for promotion, recommended Respondents 4, 5 and 6 and Shri Sharda Prasad for promotion as Additional District & Sessions Judges in those vacancies. Respondents 5 and 6 on that date were acting as Deputy Registrar, Patna High Court and Secretary, Bihar Legislative Assembly, respectively, and since the release of Respondent 5 from that post was not in public interest, the High Court recommended temporary upgrading of that post. It further recommended

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- A that Respondent 6 should act as Additional District and Sessions Judge in the second longer vacancy and in case the State Government did not think it proper to relieve him, the post of Secretary, Bihar Legislative Assembly should be upgraded. Respondent 4 was recommended to be promoted as Additional District & Sessions Judge in the third longer vacancy. He joined in the promoted rank on June 17, 1959 and continued in it till October 1, 1959. Before the actual officiation by Respondent 4 in the promoted rank, the Government by its letter, dated August 5, 1959, had approved the creation of two posts of Additional District and Sessions Judges for a period of one year in the first instance, consequent on the amendment of Bengal, Agra and Assam Civil Court Act, 1887.

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- C On May 22, 1959, the Government sanctioned the creation of two posts of Peripatetic District & Sessions Judges for a period of two years. Thus, between April 25, 1959 and June 17, 1959 four extra posts of Additional District & Sessions Judges were created, and were available for the persons found fit and due for promotion from the cadre of Sub-ordinate Judges. On August 17, 1959, the High Court recommended Sarvshri A. N. Sahay, R. B. P. Sinha, C. P. Singh (Respondent 5) and E. Rahman (Respondent 6) for promotion as Additional District and Sessions Judges.
- D It, however, made it clear that since Respondents 5 and 6 could not be relieved from the posts of Deputy Registrar, High Court and Secretary, Legislative Assembly, they should continue in these posts after the same had been upgraded. The High Court further recommended that in view of the heavy arrears two more posts of Additional District and Sessions Judges be created for the period for which Respondents 5 and 6 were to continue on the posts they were then holding.
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- F Ten more posts of Additional District & Sessions Judges fell vacant between November 1, 1959 and April 6, 1960. Thus, there were, in all, fourteen vacancies in the posts of Additional District and Sessions Judges, to one of which Respondent 4 could and should have been appointed, if there was no administrative or procedural delay attributable to his fault. Respondents 1, 2 and 3 were appointed as Additional District and Sessions Judges by a Government notification, dated April 21, 1960. Despite the availability of a post and suitability of Respondent 4 to be appointed as Additional District & Sessions Judge, he was promoted to that post on September 19, 1960. Respondent 4 made a representation dated April 10, 1961, to the State Government praying for fixation of his seniority just below Shri E. Rehman in the cadre of Additional District and Sessions Judges. He followed it up by supplementary representations in the same connection. These representations remained pending on the administrative side of the High Court. By a letter dated August 20, 1964, the High Court recommended the rejection of his representations. The Government, however, was of the opinion that there was substance in the representation of Respondent 4. It therefore made a back reference on August 5, 1965 to the High Court for reconsideration of the matter. The High Court, however, informed the Government that it did not see any reasons to reconsider the matter. Thereafter the Government took a decision and allowing the representation of Respondent 4, ordered that he should be deemed to
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have been officiating as Additional District and Sessions Judge with effect from November 1, 1959 and for purposes of seniority, should rank immediately below Respondents 5 and 6 in the cadre of the Superior Judicial Service. The Government was of opinion that on a proper interpretation of Rule 16(e) of the Bihar Superior Judicial Service Rules, it was authorised to fix the seniority from a date from which officiation was possible on account of availability of vacancy. On being satisfied that the delay between October 1, 1959 and September 19, 1960, in the promotion and appointment of Respondent 4 to the post of Additional District and Sessions Judge, when several posts in that cadre were vacant, was wholly an administrative and procedural delay, the State Government in order to relieve undue hardship to Respondent 4, relaxed Rule 16(e) of the Service Rules and passed the impugned order which it communicated to the High Court by a letter dated January 24, 1968, which reads as follows :

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"I am directed to refer to your letter No. 501 dated 18-1-66 on the subject noted above and to say that after a careful consideration of the case of Shri Jitendra Narain at present District and Sessions Judge of Dhanbad, the State Government have been pleased to decide that Shri Narain shall rank immediately below Shri Enayetur Rahman and above Sarvashri Madan Mohan Pd., Rameshwar Pd. Sinha and Chandra Shekhar Prasad Singh, the direct recruits from the Bar in the cadre of the Superior Judicial Service, and for this limited purpose, he will be deemed to have been officiating as Additional District and Sessions Judge with effect from 1st November 1959".

Thus, the question before the High Court was one of fixation of the seniority of the writ-applicants, the three direct recruits, *vis-a-vis* Respondent 4. In this context, the interpretation of Rule 16(e) of the State's Superior Judicial Service Rules came up for consideration. This Rule provides :

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"Seniority of direct recruit *vis-a-vis* promoted officer shall be determined with reference to the dates from which they may have been allowed to officiate continuously, in posts in the cadre of the service or in posts outside the cadre on identical time-scale of pay and of equal status and responsibility or in posts of higher scale of pay and of higher responsibility in or outside the cadre."

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There, as here, it was contended that the meaning of the expression "may have been allowed to officiate continuously" occurring in the above quoted clause is that a notional, continuous officiation in a post in the cadre of the Service or outside it, will give preference to the promoted officer in the matter of seniority over the direct recruit provided there were vacancies in one of which he could or might have been allowed to officiate continuously. The High Court rejected this contention and held that this expression means actual and continuous officiation and not a fictional or notional one. The High Court, however, went further and said that the power to determine seniority being a matter of control exclusively vests in the High Court

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**A** under Article 235 of the Constitution. If further held that the Government could not fix the seniority of Respondent 4, as they had done by taking recourse to the "hardship rule" framed by them under the proviso to Article 309 of the Constitution. According to it, what the Government could not do directly, could not be indirectly done by it by relaxing the requirement of Rule 16(e).

**B** Shri Madan Mohan Prasad (Respondent No. 1 in the original petition) has since been appointed to the Bench of the High Court. Consequently, he has withdrawn his appeal (Civil Appeal No. 1928 of 1970) which stands dismissed as such with no order as to costs.

**C** We are told that Sarvashri Rameshwar Prasad Singh (Respondent 2), Jitendra Narain (Respondent 4) and Chandrika Prasad Sinha (Respondent 5) have also been appointed to the Bench of the High Court, and that Respondents 3 and 6 have since retired from service as District and Sessions Judges. The matter has thus been rendered academic, except, as the Solicitor-General says, for the limited purpose of fixing pension and gratuity on the basis of the length of service in the cadre of Superior Judicial Service.

**D** Before dealing with the contentions canvassed, it will be appropriate to notice the relevant provisions of the Bihar Superior Judicial Service Rules, 1951. Rule 6 says that of the posts in the cadre of the service, two-thirds shall be filled by promotion and one-third by direct recruitment. Then there is a proviso which gives the State Government power to deviate from this proportion after consultation with the High Court. Rule 15 deals with confirmation. It says :

**E** "15(1)(a). A member of the Service appointed under clause (a) of rule 5 shall be on probation for a period of one year and shall not be confirmed unless he is found to be suitable in every respect for appointment to the Service:

**F** Provided that the period of probation may be extended by the State Government, in consultation with the High Court.

**G** (b) When such a member is confirmed in the Service the period spent on probation shall be counted towards leave, pension or increments in the relevant time-scale.

(2) Promoted officers appointed against substantive vacancies in the cadre shall forthwith be confirmed in the Service."

Then comes Rule 16 which regulates the *inter-se* seniority. It provides :

**H** "16(a). Seniority *inter se* of direct recruits shall be determined in accordance with the date of their substantive appointments to the Service:

Provided that a direct recruit appointed to the post of an Additional District Judge shall be junior to a direct recruit appointed to any other post in the schedule.

(b) Seniority *inter se* of promoted officers shall also be determined in accordance with the dates of their substantive appointments to the Service.

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(c) When more than one direct recruit is appointed at one time, the seniority *inter se* will be determined in accordance with the order given in the notification making their appointments.

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(d) When more than one appointment is made by promotion at one time, the seniority *inter se* of the officers promoted shall be in accordance with their respective seniority in the Bihar Civil Service (Judicial Branch).

(e) . . .

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There is a Note appended to this rule which clarifies that a period of leave or the annual vacation of the Civil Courts will not be treated as an interruption for the purposes of this sub-rule.

It will be seen that these rules are silent as to whether any question in regard to *inter se* seniority of the promoted officers and the direct recruits is to be determined by the High Court or the State Government in consultation with the High Court.

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Mr. Lal Narain Sinha, Solicitor General contends that this question is concluded by the decision of this Court in *Chandramouleshwar Prasad v. Patna High Court and ors.*(<sup>1</sup>). It is therefore proposed to notice that case in some detail.

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There, the petitioner as well as respondents 3 to 5 belonged to the Judicial Service of Bihar. They had joined service as Munsiffs. In due course, they were promoted as Subordinate Judges. In 1962, the question of promoting them as Additional District and Sessions Judges was considered by the High Court and the Government. The High Court wanted respondents 3 and 4 to function as Additional District and Sessions Judges ahead of the petitioner and its recommendation in that behalf was accepted by the Government. Due to certain circumstances, the petitioner started acting as such earlier than respondents 3 to 5. The Bihar Civil List published in March 1968 showed the petitioner as No. 10 and respondents 3 to 5 as Nos. 12 to 14 in the cadre. Respondents made a representation to the High Court for correction of the gradation list. The High Court accepted their representation in September 1968. In the same month the District and Sessions Judge at Bihar retired and respondent No. 3 who was the 3rd Additional District and Sessions Judge was asked by the High Court to officiate in the vacancy. The petitioner who was also working as 1st Additional District and Sessions Judge in the same place considered this to be a supersession and memorialised the Government. The latter took action on October 17, 1968 appointing the petitioner as officiating District and Sessions Judge. Thereupon the High Court transferred the petitioner to another District on October 25, 1968. The petitioner moved this Court under Art. 32 challenging the validity of the order of the High Court transferring him from Errah and posting him as Additional District and Sessions Judge at Singhbhum and the direction

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(1) [1970] 2 S.C.R. 666.

**A** or the order of the High Court dated September 23, 1962 declaring respondents 3 to 5 as senior to him in the gradation list of Additional District and Sessions Judges maintained by the High Court. He further prayed that the High Court be directed to allow him to take over charge as officiating District and Sessions Judge at Errah in terms of the Government's notification dated October 17, 1958. The main ground on which he challenged the direction or order of September 23, 1968 relating to his position in the gradation list was that it was in contravention of r.16(b) and r.16(d) of the Bihar Superior Judicial Service Rules, 1951. He took his stand on the notification dated October 17, 1968 of the Government purporting to appoint him temporarily as District and Sessions Judge, Errah.

On the question of fixing of seniority, this Court speaking through Mitter J. said:

**C** "The position of a person in a Civil List gives no indication of his intrinsic quality as an officer. The list merely shows the length of service of the officers according to the dates of their appointment, their posting at the time when the list is published and their designation and scale of pay at that time. The gradation list of the High Court has no legal basis and its preparation is not sanctioned by the Bihar Superior Judicial Service Rules. The seniority *inter se* of the petitioner and the three respondents will have to be determined when the question of their confirmation comes up for consideration . . . .

**E** We only hope that there will be no such misunderstanding between the High Court and the Secretariat in the future and if there ever be any difference of opinion attempts will be made to resolve them by mutual deliberation without one or the other making an order or giving a direction contrary to the views of the other before deliberation."

In the result this Court held:

**F** "that the Government notification of October 17, 1968 was not in terms of Art. 233 of the Constitution and consequently the question of quashing the High Court's order dated October 25, 1968 does not arise. We also hold that the Gradation List of Additional District and Sessions Judges prepared by the High Court has no legal sanction and that the seniority of the petitioner and respondents 3 to 5 can only be determined in the superior Judicial Service where they are now all holding officiating posts when the occasion arises."

**H** It is to be noted that in *Chandramouleshwar* (supra), this Court was concerned only with cl.(b) and (d) of r.16; while in the present case, we are concerned with fixation of *inter se* seniority of promoted officers *vis-a-vis* the direct recruits which matter is governed by cl.(e) of the said rule. It will be seen from what has been extracted above that in *Chandramouleshwar*, even while construing cl.(b) and (d), this Court did not say in express terms that the gradation list prepared by the High Court was invalid because under the concerned rules, the

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High Court had no power to determine *inter se* seniority of the promoted officers or that the determination of such seniority was a matter for the State Government. All that was held was that the question of determining *inter se* seniority in terms of cl. (b) and (d) of r. 16 does not arise before their confirmation comes up for consideration. In other words, the question of determining *inter se* seniority of the promoted officers could not be determined apart from and prior to their confirmation in the Service. Since the Civil List prepared by the High Court had not been drawn up in accordance with the aforesaid rule, it had "no legal basis". Thus, *Chandramouleshwar* seems to lay down that the question of determining *inter se* seniority of promoted officers is intertwined with the question of their confirmation in the Service. According to cl. (a) of r. 16, *inter se* seniority of direct recruits is also to be determined in accordance with the dates of their confirmation in the Service. In this case, however, we are concerned with fixation of the seniority of direct recruits *vis-a-vis* promoted officers. The relevant clause for this purpose is cl. (e) of r. 16. The governing criterion, according to this clause, is "the date from which they may have been allowed to officiate continuously in posts in the cadre of the Service or in posts outside the cadre on identical time-scale of pay and of equal status and responsibility or in posts of higher scale of pay and of higher responsibility."

Reading clause (e) together with cl. (a) and (b) of r. 16, it is clear that before fixing the seniority of direct recruits *vis-a-vis* promoted officers, it will be necessary as a preliminary step, to prepare two separate seniority lists, one of direct recruits under cl. (a) and the other of promoted officers under cl. (b) of r. 16, in the chronological order of their confirmation.

This Court has recently held in *The High Court of Punjab and Haryana etc. v. The State of Haryana and ors.*<sup>(1)</sup> that the power of confirmation of District Judges is a part of the power of control vested in the High Court under Art. 235 of the Constitution. Since the Bihar Superior Judicial Service Rules, make the chronological order of confirmation an integral part of the process of fixation of the order of seniority in the Service, the inference is that both these powers were intended to be exercised by one and the same authority. Since Article 235 of the Constitution vests the power of confirmation in the High Court, it stands to reason that the power of determining the seniority in the Service is also with the High Court. Of course, in determining the seniority the High Court is bound to act in accordance with the Rules validly made by the Governor under the Proviso to Art. 309 of the Constitution.

Be that as it may, it is not necessary to pursue the discussion further. Appointment of three of respondents to the Bench of the High Court and retirement of two others has rendered the matter largely, if not entirely, academic.

We further agree with the High Court that the words "may have been allowed to officiate continuously" in cl. (e) of r. 16 mean actual

(1) A.I.R. 1975 S.C. 613.

A and continuous officiation and not a fortuitous or fictional officiation. A notional construction of the clause would lead to anomalous results. The State Government therefore, could not *on an interpretation of* r.16(e) says that for the limited purpose of seniority respondent 4 would rank below respondents 2 and 3 but above the writ petitioners and will be *deemed* to have been officiating as Additional District and Sessions Judges with effect from November 1, 1969. Such a deeming officiation, as rightly held by the High Court, for the purpose of determination of seniority on a construction of cl.(e) was not permissible.

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For the foregoing reasons, the appeal fails and is dismissed without any order as to costs.

P.B.R.

*Appeal dismissed.*