

(2007) 07 KL CK 0102

In the High Court Of Kerala

Case No : Writ Petition (C) No. 16621 of 2005

Gopinathan, P.S.

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 31-07-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 113
Constitution of India, 1950 — Article 233, 234, 309
Kerala Higher Judicial Service Rules, 1961 — Rule 2, 4, 6, 7
Kerala State Higher Judicial Service Rules, 1991 — Rule 6

Citation : (2007) 07 KL CK 0102

Hon'ble Judges : S. Siri Jagan, J; K.M. Joseph, J

Bench : Division Bench

Advocate : Elvin Peter, P.J., S. Ramesh and T. Naveen, for the Appellant; K.R.B. Kaimal and S. Ramesh Babu, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Joseph, J.—This Writ Petition came to be referred to us by a learned Single Judge. The issue that falls to be considered and decided is as to whether the Petitioner is entitled to be ranked as senior to Respondents 3 to 6 as District and Sessions Judge.

Chronological narrative of Events:

2. The Subordinate Judiciary in the State of Kerala consisted of the categories of District Judges, Chief Judicial Magistrates, Subordinate Judges, Munsiffs, Judicial Magistrates of the First Class and Judicial Magistrate of the Second Class. The Higher Judicial Service comprises of the category of District Judges. Formerly, there were Kerala Civil Judicial Service and Kerala Criminal Judicial Service separately. The Kerala Civil Judicial Service consisted of Subordinate Judges and Munsiffs. The Kerala Criminal Judicial Service consisted of Chief Judicial Magistrates, Judicial Magistrate of the First Class and Judicial Magistrates of the Second Class. The Civil Judicial Service and Criminal Judicial Service were born

as the result of Orders issued in the year 1973 by which the Subordinate Judiciary was also bifurcated for the first time as Civil Wing and Criminal Wing. Of course, the system actually began to function pursuant to the decision of the Apex Court in Civil Appeal No. 2047/74 dated 14-2-1978 from April, 1978. The Higher Judicial Service is constituted under Rules published on 18-7-14)61. It consisted of two categories:

Category (1): Selection Grade District and Sessions Judge.

Category (2): District and Sessions Judge (including Additional District and Sessions Judge).

The appointment to Category No. 2 as above was being made by transfer from category of Subordinate Judges and recruitment from the Bar. The number of posts to be filled up by direct recruitment is 1/3rd of the permanent posts in categories 1 and 2 together. While the Rules stood so, a Select List of Subordinate Judges was prepared on 8-1-1991 and approved by the Administrative Committee of the High Court. The sixth Respondent who was working as Subordinate Judge was superseded. The Select List of Subordinate Judges so prepared was approved by the Full Court Meeting of the Judges held on 11-1-1991. It was forwarded to the Government on 19-1-1991. By Ext.P-1 dated 19-11-1991, Government approved the list of Subordinate Judges for appointment as District and Sessions Judge. The Petitioners ranked No. 2 in the said list. By Ext.P-23 dated 10-12-1991, the Registrar addressed the Commissioner and Secretary to Government in the Home Department, as follows:

As per Government Order read as first paper above, sanction has been accorded for the establishment of three Special Courts at Thiruvananthapuram for the trial of Mark list Cases, in the light of the Supreme Court direction dated 20-8-1991 in Civil Appeal Nos. 3193 and 3194 of 1991. Government have also sanctioned three posts of Special Judges (District Judges) in the scale of pay of Rs. 3175-4605 in the new courts to be established.

As per Government Order (Ms.) No. 159/91/Home, dated 19-11-1991, Government have approved a panel of 11 Sub Judges for appointment as District Judges in the Kerala State Higher Judicial Service. In order to provide three District Judges in the new Special Courts to be established at Thiruvananthapuram, the actual appointment as District Judges of the following three Officers, is necessary:

1. Shri Rs. Gopinathan, Principal Sub Judge, Vadakara.
2. Shri K.S. Gopinathan Pillai, Principal Sub Judge, Irinjalakuda.
3. Shri M.V. Viswanathan, Sub Judge, Koyilandy.

It may be noted that Shri James J. Muricken who has been appointed as District Judge in the Kerala State Higher Judicial Service as" per G.O. read as third paper above, has been posted as Additional District Judge, Thodupuzha.

I am therefore to request you to please obtain and communicate Government Orders and notifications appointing the above three officers in the panel, as District Judges in the Kerala State Higher Judicial Service immediately.

Thus, Ext.P-23 would show that Government have sanctioned three posts of Special Judges (District Judges) in the new Courts to be established in the light of the direction of the Apex Court. Reference is made to Ext.P-1. It is further stated that, to provide the three District Judges in the Courts to be established, appointment of the three Officers including the Petitioner is necessary. Accordingly, the Registrar addressed the Government to issue appropriate orders for appointment of the three persons including the Petitioner. Shri James J. Muricken who is ranked at No. 1 in Ext.P-1 Select List was appointed by Order dated 19-11-1991 and posted as District Judge, Thodupuzha. While matters stood so, there took place certain developments which are crucial to the decision in this case. They are as follows:

As already noticed, formerly Subordinate Judges alone were included in the feeder category for appointment as District Judges. There was a proposal for unification of the Civil and Criminal Service. The two Services came to be integrated as per Order G.O.(P) No. 190/91/Home, dated 31-12-1991 and a unified service was brought into force with effect from 1-1-1992. In other words, in the place of the Kerala Civil Judicial Service and the Kerala Criminal Judicial Service, a common service as the Kerala Judicial Service Rules, 1991 came to be issued on 31-12-1991 and it was published in the Gazette on 31-12-1991. It came into effect from 1-1-1992. The Common Service constituted under the said Rules consisted of the following categories of Officers:

Category 1: Subordinate Judges/Chief Judicial Magistrates.

Category 2: Munsiff-Magistrates.

3. Constitution.-

(1) There shall be a common service called "The Kerala Judicial Service" in the place of existing Kerala Civil Judicial Service and Kerala Criminal Judicial Service.

(2) The service shall consist of the following categories of Officers, namely-

Category 1: Subordinate Judges/Chief Judicial Magistrates.

Category 2: Munsiff-Magistrates.

(3) The service shall first be formed by integrating the members of the Kerala Civil Judicial Service consisting of Subordinate Judges and Munsiffs and the Members of the Kerala Criminal Judicial Service consisting of Selection Grade Chief Judicial Magistrates, Chief Judicial Magistrates, Senior Grade Judicial Magistrates of the first class, Judicial Magistrates of the first class and Judicial Magistrates of the second class.

(4) On the date of the coming into force of these Rules, Category I, Subordinate

Judges/Chief Judicial Magistrates, shall be formed by integrating those in the category of Subordinate Judges and those in the category of Selection Grade Chief Judicial Magistrates and Chief Judicial Magistrates in the ratio of 3:1, that is, the first three places shall be given to the Subordinate Judges and the fourth place to the Chief Judicial Magistrates and so on and Category 2, Munsiff-Magistrates, by integrating those in the category of Munsiffs and those in the category of Senior Grade Judicial Magistrates of the first class and Judicial Magistrates of the first class, on the basis of the ratio of 5:2, that is, the first three places shall be given to the Munsiffs, the fourth place to the Magistrates, fifth and sixth to the Munsiffs, seventh place to the Magistrates and so on.

(5) All the existing Judicial Magistrates of the second class at the commencement of these Rules shall be absorbed in the category of Munsiff-Magistrates and shall be ranked below all the then existing Munsiff-Magistrates.

It is after the enactment of the Kerala Judicial Service Rules, 1991 that Ext.P-2 Order dated 14-1-1992 was issued appointing the Petitioner and two others as District and Sessions Judges without prejudice to the claims of candidates to be recruited from the Bar as provided u/s 2(b) of the Kerala State Higher Judicial Service Rules, 1961 (hereinafter referred to as the Rules). Ext. P-3 is the Notification dated 14-1-1992 issued on behalf of the Governor appointing the Petitioner and others as District and Sessions Judges. At this juncture, in deference to the chronological scheme of things, the telex message sent by the Government to the High Court on 1-2-1992 is extracted below:

Please refer your letter No. B2-2770/91, dated 12-8-1991 and G.O.(Ms.) No. 159/91/Home, dated 19-11-1991. Amendments to Sub-rule (B) of Rule 2 of the Kerala State Higher Judicial Service Rules R commende in your O.No. B2-13165/83, dated 3-1-1992 is under active consideration of Government. High Court may kindly examine whether in view of the integration of Subordinate Judiciary ordered in G.O.(P) No. 190/91/Home dated 31-12-1991 revised list of Officer to be included in the panel of Sub Judges/Chief Judicial Magistrate for appointment as District and Sessions Judges may not be fore+prepared and kept already for Usz. F.O. In Ly forward necessary proposal at the earliest.

Apparently, the question arose whether in view of the direction of the Apex Court referred to in Ext.P-23, which we have already extracted, it was necessary to fill up the three vacancies and whether temporary appointments could be made without any claim for seniority. The matter was placed before the Administrative Committee at the High Court on 11-2-1992. The Administrative Committee approved and made the following recommendations among other matters:

(1) The panel of Sub Judges prepared by the High Court and approved by the Government be annulled except in the case of those already appointed from the panel;

(2) Even in the case of those appointed from the panel after 1-1-1992, their appointment may be treated as temporary without probationary rights. Their

seniority in the category be decided later after a fresh panel is prepared;

(3) Steps be taken to prepare a fresh panel for appointment as District Judges from among Sub Judges/Chief Judicial Magistrates in service on 1-1-1992;

(4) While taking such steps, the case of Shri K.N. Balakrishna Panicker, the seniormost Sub Judge who had been superseded last time, be considered after assessing his judgments.

The Full Court before which the said recommendations were placed, approved the same. The Full Court also took the view that as evaluation of the judgments of the sixth Respondent was made more than a year prior to the date of the meeting and that too, with reference to the Subordinate Judges alone, his claim also should be considered afresh. It is in the light of the second recommendation as above, apparently, that Ext.P-4 order dated 29-2-1992 came to be made by the High Court posting the Petitioner as Additional District Judge, Kozhikode along with the two others covered by Exts.P-2 and P-3. In paragraph 7 of Ext. P-4 order, it is stated as follows:

The posting of the Officers mentioned at SI. Nos. 2, 4 and 6 will be temporary and without probationary rights and their seniority in the category of District Judge will be determined later.

By G.O.(P) No. 47/92/Home, dated 29-2-1992 published in the Gazette on 29-2-1992, Rule 2(b) of the Rules was substituted by providing for the category of Chief Judicial Magistrates also to be a feeder category for appointment to Category No. 2 of the Kerala State Higher Judicial Service. Apparently, this was in view of the fact that Category No. 1 in the Kerala Judicial Service Rules which came into effect on 1-1-1992 consisted of Subordinate Judges and Chief Judicial Magistrates. Appointment to the category of District Judges by transfer was contemplated to be made from the combined category of Subordinate Judges and Chief Judicial Magistrates from 1-1-1992. While so, Respondents 3 to 5 were directly appointed as District Judges by the Governor. Respondents 3 and 4 were appointed on 31-3-1992 and they took charge on 2-4-1992. The fifth Respondent was appointed as per order dated 30-5-1992 and he took charge on 1-6-1992. The High Court drew up a fresh panel of Sub Judges and Chief Judicial Magistrates for promotion as District and Sessions Judges in accordance with the new Rules which was approved by the Full Court on 21-2-1992. Apparently, in the wake of the decision of the Full Court on 21-2-1992 following the recommendation of the Administrative Committee and in the wake of the other developments, Ext.P-5 dated 15-7-1992 was issued by the Governor approving the panel of Subordinate Judges and Chief Judicial Magistrates for appointment as District and Sessions Judges. In Ext.P-5 panel, the sixth Respondent is placed at SI. No. 1 and the Petitioner is shown at SI. No. 2, describing them as Subordinate Judges. Ext.P-6 is the order dated 15-7-1992 issued by the Governor appointing eight persons from Ext.P-5 panel, including the Petitioner, as District and Sessions Judges. Therein also, the Petitioner is described as

Subordinate Judge. By Ext.P-7 dated 31-7-1992, the High Court of Kerala, inter alia, directed that the Petitioner who has been appointed as District Judge as per Ext.P-6 is allowed to continue in the present post as regular District Judge. On the basis of the Office Memorandum of the High Court dated 29-9-1992 it was proposed to show the seniority of the Petitioner below the sixth Respondent. Petitioner addressed Ext.P-8 dated 28-10-1992. Ext.P-9 is the seniority list of Selection Grade District and Sessions Judges as on 16-8-1994. Thereunder, the Petitioner was shown at SI. No. 60, while Respondents 3 to 6 were shown at SI. Nos. 56 to 59 respectively. Petitioner addressed Ext.P-10 representation dated 25-10-1994. Ext.P-11 dated 18-1-1995 issued by the High Court would show that the High Court has declared the probation of the Petitioner in the category of District and Sessions Judge with effect from 31-7-1994. The date of commencement of probation is shown as 31-7-1992 which is, apparently, the date of Ext.P-6. Petitioner, feeling aggrieved by the date of declaration of probation, as also the commencement of probation, filed Ext.P-12 representation dated 17-4-1995. As it did not evoke any response, he preferred Ext.P-13 dated 7-2-1998 requesting for a decision on his earlier representation at the earliest. Ext.P-14 is yet another representation dated 20-5-2000. By Ext.P-15 dated 18-12-2003, the High Court issued an order promoting Respondents 3 to 5 as Selection Grade District and Sessions Judges in preference to the Petitioner. Petitioner is shown therein promoted as Selection Grade District Judge with effect from a later point of time than Respondents 3 to 5. Petitioner filed a representation against the same as Ext.P-16 dated 8-3-2004. Petitioner was served with Ext.P-17 dated 12-3-2004, wherein the High Court has stated as follows:

Sri P.S. Gopinathan, Member Secretary, Kerala State Legal Services Authority is informed that his earlier representations dated 28-10-1992 and 25-10-1994 for re-fixation of his seniority in the category of District Judge are under consideration of the High Court. His present representation for advancing the date of his promotion as Selection Grade District Judge, vis-a-vis the seniority of the direct recruit District Judges will be considered after the High Court has decided on his earlier representations.

By Ext.P-18 dated 1-9-2004, the High Court ordered promotion as Selection Grade District Judge as regards Respondents 3 to 5 with retrospective effect from 3-7-2000, 12-7-2000 and 12-7-2000 respectively. Petitioner is also given retrospective promotion as Selection Grade District Judge with effect from 12-7-2000, but below the fifth Respondent. While Respondents 3 to 5 are shown at SL Nos. 11, 12 and 13, Petitioner is shown at SI. No. 14. Petitioner addressed Ext.P-19 representation dated 15-9-2004 pointing out his grievance against Ext.P-18 and seeking consideration of his case. By Ext.P-20 dated 2-11-2004, the High Court promoted Respondents 3 to 5 as Super Time Scale District and Sessions Judges with effect from 13-10-2004, 14-10-2004 and 28-10-2004. Petitioner was retained as Selection Grade District and Sessions Judge. It is under these circumstances that the Petitioner has approached this Court with the

following prayers:

(i) Issue a writ of certiorari or any other appropriate writ, direction or order calling for the records leading to Ext.P-9, to the extent it assigns seniority to Respondents 3 to 6 above the Petitioner in the category of District and Sessions Judge, and quashing the same.

(ii) Issue a writ of mandamus or any other appropriate writ, direction or order declaring that the Petitioner is entitled to be placed above Respondents 3 to 5 in the category of Selection Grade District and Sessions Judge in Exts.P-15 and P-18 and based on that all consequential benefits including arrears of pay should be made available to him.

(iii) Issue a writ of mandamus or any other appropriate writ, direction or order directing Respondents 1 and 2 to give promotion to the Petitioner as Super Time Scale District and Sessions Judge in preference to Respondents 3 to 5 in Ext.P-20 and based on that to give him all consequential benefits including arrears of pay.

(iv) Issue a writ of mandamus or any other appropriate writ, direction or order directing that the Petitioner should be given seniority above Respondents 3 to 6 in the category of District and Sessions Judge based on Exts.P-2 and P-3 and that he should be given further promotions to the categories of Selection Grade District and Sessions Judge and Super Time Scale District and Sessions Judge in preference to Respondents 3 to 5 and all consequential benefits flowing out of that including arrears of salary should be made available to him.

Later, the Writ Petition was amended wherein a prayer was incorporated seeking to challenge Exts.P-21 and P-22. Ext.P-21 is an Office Memorandum of the High Court dated 9-9-2005 by which it is stated as follows:

Referring to the letter cited, whereby Sri P.S. Gopinathan, Motor Accidents Claims Tribunal, Kozhikode submitted his objection to the assignment of his seniority in the Statewise seniority list of District Judges as on 20-6-1991, the Officer is informed as follows:

The appointment of Sri Rs. Gopinathan Sub Judge as District Judge as per G.O. (Ms.) No. 12/92/Home, dated 14-1-1992 was made on temporary basis in the circumstances, a combined seniority list of Sub Judge, Chief Judicial Magistrates had to be prepared in the light of the integration of the Civil and Criminal Wings of the State Subordinate Judiciary with effect from 1-1-1992. Pending preparation of the combined seniority list, he was posted as District Judge without any probationary rights, on 6-3-1992. Therefore, the District Judges who were appointed on regular basis by recruitment from the Bar, had to be assigned seniority over those whose appointment stood on temporary basis without any probationary rights. The assignment of seniority to Sri K.N. Balakrishna Panicker over Sri P.S. Gopinathan also is not to be interfered, as he also was included in the panel of Sub Judges for regular promotion as District Judges based on his seniority, despite his supersession in the previous panel prepared by the High

Court.

Based on the above grounds, the request of Sri P.S. Gopinathan to refix his seniority in the seniority list of District Judges, as, contained in his letter cited second is rejected. The Officer is informed accordingly.

In Ext.P-22 issued by the High Court, it is stated as follows:

In inviting the attention of Sri P.S. Gopinathan, District Judge, Thodupuzha to his letters cited third whereby he submitted his objections to the seniority assigned to him in the statewide seniority list of District Judges as on 25-10-1994, and also to his seniority as shown in the statewide seniority list of Sub Judges/Chief Judicial Magistrates as on 1-1-1992, and the resultant discrepancies in the seniority of District Judges the Officer is informed that the High Court has considered both his representations in detail and has decided to reject his contentions as contained in them on the following grounds:

That his appointment as District Judge while functioning as Sub Judge in the erstwhile Civil Judicial Service, as per G.O.(Ms.) No. 12/92/Home, dated 14-1-1992 was made on temporary basis in the circumstances a revised seniority list of Sub Judges/Chief Judicial Magistrates had to be prepared following the integration of the Civil and Criminal Wings of the State Subordinate Judiciary with effect from 1-1-1992. Pending preparation of the combined seniority list he was posted as District Judge without any probationary rights on 6-3-1992. Therefore, the District Judges who were appointed on regular basis direct from the Bar had to be assigned seniority over those whose appointment stood on temporary basis without any probationary rights. The assignment of seniority to Sri K.N. Balakrishna Panicker over Sri P.S. Gopinathan also is not to be interfered as he also was included in the panel of Sub Judges/Chief Judicial Magistrates prepared by the High Court for regular promotion as District Judges, based on his seniority in the combined category of Sub Judges/Chief Judicial Magistrates which come into force with effect from 1-1-1992, despite his supersession in the previous panel prepared by the High Court from which Sri P.S. Gopinathan was appointed as District Judge, on temporary basis.

3. According to the Petitioner, seniority is a matter to be decided with reference to Rule 6 of the Rules.

4. If the matter falls to be decided with reference to Exts.P-2 and P-3 issued by the Governor under Article 233 of the Constitution, then clearly the Petitioner would be entitled to claim seniority over Respondents 3 to 6. This is because Exts.P-2 and P-3 are dated 14-1-1992, while Respondents 3 to 5 were appointed much after the said date. It is the case of the Respondents that the first order of appointment of the Petitioner to be considered in the context of Rule 6 is Ext.P-6 dated 15-7-1992. It becomes imperative to refer to and extract Rules 4 and 6 of the Rules:

4. Probation.- (a) Every person appointed to category (2) shall, from the date on

which he joins duty, be on probation for a period of two years on duty within a continuous period of three years.

(b) There shall be no probation for category (1).

6. Seniority.-

(1) The seniority of a person appointed either to category (1) or category (2) shall, unless he has been reduced to a lower rank as punishment, be determined with reference to the date of the order of his first appointment to the said category:

Provided that the seniority of a person appointed to category (2) prior to the 1st January 1979 shall be determined with reference to the date from which he was appointed to the category otherwise than on a temporary basis without being subsequently reverted from the post.

(2) If two or more persons are appointed by the very same order either to category (1) or to category (2) their inter se seniority shall be determined by the serial order in which their names appear in the appointment order.

5. We heard Shri Elvin Peter, learned Counsel appearing for the Petitioner, Shri V. Giri, learned Counsel appearing on behalf of Respondents 3 and 5, Shri S. Ramesh Babu, learned Counsel appearing for the fourth Respondent and Shri K.R.B. Kaimal, learned senior counsel appearing for the second Respondent, High Court of Kerala. There is no representation for the sixth Respondent.

Contentions of the Petitioner:

6. Shri Elvin Peter, learned Counsel for the Petitioner would contend that under Rule 6, undisputably it is the first order of appointment which clinches the issue regarding seniority. He would submit that Exts.P-2 and P-3 are issued by the Governor who is the competent authority under Article 233. He would submit that there is nothing in the preparation of a panel or in the consultative process between the High Court and the Governor to suggest that the appointment of the Petitioner was intended by the Governor to be temporary, even though power exists under the KS and SSR which is applicable to the appointment under the Rules vide Rule 7 thereof to make temporary appointments. He would impugn Ext.P-4 order issued by the High Court whereunder the High Court posts the Petitioner as temporary and without probationary rights, as beyond the authority of the High Court. In this connection, he relies on the decision in State of Assam Vs. Ranga Mahammad and Others, whereunder the Apex Court held as follows:

In Article 233 the word "posting" clearly means "assigning someone to a post", i.e., a position or a job, specially one to which a person is appointed. This word occurs in association with the words "appointment" and "promotion" and takes its colour from them. These words indicate the stage when a person first gets a position or job and "posting" by association means the assignment of an appointee or promotee to a position in the cadre of District Judges. That a special

meaning may be given to a word because of the collocation of words in which it figures, is a well-recognised canon of construction. The word "posting" cannot be understood in the sense of "transfer" when the idea of appointment and promotion is involved in the combination. In fact this meaning is quite out of place because "transfer" operates at a stage beyond appointment and promotion. If "posting" was intended to mean "transfer" the draftsman would have hardly chosen to place it between "appointment" and "promotion" and could have easily used the word "transfer" itself. It follows, therefore, that under Article 233, the Governor is only concerned with the appointment, promotion and posting to the cadre of District Judges but not with the transfer of District Judges already appointed or promoted and posted to the cadre.

He would therefore contend that it is the Governor alone who has authority in law to appoint, promote and post District Judges. The High Court, of course, is empowered to transfer District Judges. When the High Court in Ext.P-4 purported to post the Petitioner as temporary District Judge, the High Court was exceeding its jurisdiction, counsel contends. He would draw attention to Ext. P-23 dated 10-12-1991. He would, therefore, contend that three posts of District Judges stood created apparently in the wake of the direction of the Apex Court. It is to one of those posts that the Petitioner stood appointed on 14-1-1992, he contends.

7. Ext.P-1 was issued on 19-11-1991, whereunder the Governor approved the panel of Sub Judges for appointment as District Judges without prejudice to the claim of the candidates to be recruited from the Bar. Thereunder, the Petitioner is placed at SI. No. 2 just below Shri James J. Muricken, Sub Judge. Ext.P-23 is dated 10-12-1991. It is thereafter that Exts.P-2 and P-3 are issued on 14-1-1992 by which the Governor appointed the Petitioner as District and Sessions Judge and also issued the requisite Notification in this regard. It is pointed out by learned Counsel for Petitioner that Ext.P-23 would categorically show that the Government have sanctioned three posts of Special Judges (District Judges) in the new Courts to be established for trial of mark list cases in the light of the decision of the Apex Court. Shri James J. Muricken who is ranked No. 1 in Ext.P-1 came to be appointed prior to 1-1-1992. It is pointed out that if the Petitioner had been appointed prior to 1-1-1992, there would have been absolutely no controversy. However, the matter was delayed. Counsel would submit that the fact that the appointment was made after 1-1-1992 also does not make a difference. It is pointed out that before 29-2-1992, in fact, there existed two vacancies of District Judges. Shri C.P.U. Ferook Shaffi was relieved on 16-1-1992. There arose another retirement vacancy on 31-1-1992 consequent on the retirement of one Smt N.V. Leela, District and Sessions Judge. He would submit that the argument of the Respondents that the Rules were enacted on 29-2-1992 with retrospective effect from 1-1-1992 to the Kerala State Higher Judicial Service Rules, cannot affect the appointment of the persons from Ext.P-1 panel and its impact has to be contemplated with reference to the two vacancies, hereinbefore referred to. It is submitted that, in other words, retrospective

operation of the Rules cannot apply in respect of appointment to the post which was created in the year 1991 consequent to selection already made. He would further submit that the retrospectivity cannot affect persons who had already been appointed to the higher cadre, namely in the cadre of District and Sessions Judge. In this regard, he relied on the decision of this Court in Mohanan Vs. Director of Homeopathy, . With regard to Exts.P-5 and P-6 orders of appointment, it is the submission of the Petitioner that this is not a case where the doctrine of implied revocation can be applied. What this Court is considering is not a later Rule prevailing over an earlier Rule when the same cannot stand side by side. It is pointed out that there is no case that Exts.P-2 and P-3 are results of a mistake. As far as the sixth Respondent is concerned, it is pointed out that Ext.P-6 order can be treated as his first appointment order in which case, as the Petitioner is entitled to rely on Exts.P-2 and P-3 as the order of first appointment within the meaning of Rule 6 and Exts.P-2 and P-3 being dated 14-1-1992, since Exts.P-5 and P-6 are dated 14-7-1992 undoubtedly, the sixth Respondent would rank below the Petitioner. It is submitted by the Petitioner that he can ignore Exts.P-5 and P-6. Exts.P-2 and P-3 orders have not been cancelled by Exts.P-5 and P-6, he submits. In fact, the Petitioner joined duty pursuant to Exts.P-2 and P-3 as District and Sessions Judge. The service rendered by the Petitioner as District and Sessions Judge prior to Exts.P-5 and P-6 cannot be said to be wiped out, counsel submits. He would submit that although it is true that in Exts.P-5 and P-6, Petitioner is referred to as a Sub Judge, it can only be a case of a patent mistake as admittedly by virtue of Exts.P-2 and P-3 followed by Ext.P-4 order of posting, the Petitioner was actually functioning as District and Sessions Judge as on the date of Exts.P-5 and P-6. He would also submit that it is unnecessary for the Petitioner to have challenged Exts.P-5 and P-6. Any challenge to Exts.P-5 and P-6 would involve the contention that the Petitioner is giving up his right under Exts.P-2 and P-3, he contends. As long as Exts.P-2 and P-3 remained intact as they were not cancelled, Petitioner is entitled to rely on the same and claim seniority in accordance with the unambiguous provisions of Rule 6 of the Kerala State Higher Judicial Service Rules, 1991, he submits. Petitioner had a fundamental right to be considered for promotion. He relies on the decisions in Ajit Singh and Others Vs. The State of Punjab and Others, , Sarabjit Singh Vs. Ex. Major B.D. Gupta and Others, and Badrinath Vs. Government of Tamil Nadu and Others, in this regard. Petitioner relies on the decision of the Apex Court in State of Bihar and Another Vs. Bal Mukund Sah and Others, . The Apex Court in the said case held as follows:

It is not in dispute and cannot be disputed that creation of cadres and creation of posts in a cadre comprised in the Judicial Service of the State can be resorted to by the Governor in exercise of his rule-making power under Article 309 or for that matter by any appropriate legislation by the State authorities under the very same article. But once the cadre of District Judges and the Subordinate Judiciary are constituted by the aforesaid authorities and posts backed up by suitable budgetary provisions are created and are accordingly made available to be filled

in in the cadres concerned, the process of creation of posts comes to an end. Thereafter, when in the created posts borne on any judicial cadre, whether at the District Court level or at the subordinate court level, any vacancies arise by retirement or otherwise non-availability of the incumbents due to any other reason, question of filling up of those available vacancies would arise. Such available vacancies of sanctioned posts have to be filled in only after following the procedure laid down by Articles 233 and 234 of the Constitution of India and cannot be subjected to any other procedure.

That was a case where reservation of vacancies for SC/ST and OBC was sought to be made by an Act of the State Legislature. The Court proceeded to highlight the pivotal role of the High Court under Articles 233 and 234. He would also contend that a perusal of Exts.P-5 and P-6 would show that even in Ext.P-5 panel, Petitioner is not superseded by any Chief Judicial Magistrate and therefore, Exts.P-2 and P-3 must govern the field. Referring to Ext.P-4 where it is ordered by the High Court that the Petitioner would not have probationary rights, he would point out that probation is used for the purpose of testing the suitability of an appointee, and it should not be confused with the concept of seniority which is a matter which squarely falls to be decided with reference to the terms of Rule 6 which we have already referred to. Petitioner having already left the cadre of Sub Judge and having been appointed against one of the three vacancies referred to in Ext.P-23, against posts created by the Government prior to even the promulgation of the Rules, it is contended that the retrospective operation of the Rule from 1-1-1992 cannot affect the Petitioner's right to seniority under the Rules with reference to Exts.P-2 and P-3.

8. Shri K.R.B. Kaimal, learned senior counsel appearing on behalf of the second Respondent High Court would submit that what this Court has to ascertain is which is the date of the first appointment. He would submit that prior to 1-1-1992, the State Subordinate Judiciary consisted of two separate Services i.e., Kerala Civil Judicial Service and the Criminal Judicial Service. Kerala Civil Judicial Service consisted of Subordinate Judges and Munsiffs, while the Kerala Criminal Judicial Service consisted of Selection Grade Chief Judicial Magistrates, Chief Judicial Magistrates, Judicial Magistrates of the First Class and Judicial Magistrates of the Second Class. The Higher Judicial Service consisting of District Judges and Selection Grade District Judges was governed by the Kerala State Higher Judicial Service Rules, 1961. Appointment to the category of District Judges was to be made under Rule 2 by promotion from the category of Sub Judges. Of course, 1/3rd of the total posts of District Judges is to be filled up by direct recruitment from the Bar. Appointment of District Judges by promotion of Sub Judges is to be made by the Government from a panel of Sub Judges prepared by the High Court on the basis of the evaluation of judgments and the Confidential Reports of the Officers, seniority being considered only where merit and ability are approximately equal. judgments were called for and it resulted in Ext.P-1 panel being prepared. Along with the steps for preparation of the panel of Sub Judges for promotion as District Judges, second Respondent took steps

for appointment to the three vacancies of District Judges to be appointed from the Bar. Shri Balakrishna Panicker came to be excluded as the quality of his judgments and his Confidential Reports were not having the required standards. By G.O.(P) No. 190/91/Home, dated 31-12-1991, the Government of Kerala brought into force the Kerala Judicial Service Rules, 1991 by integrating the Civil and Criminal Wings of the State Subordinate Judiciary with effect from 1-1-1992. Under the new Kerala Judicial Service Rules, the categories of Sub Judges and Selection Grade Chief Judicial Magistrates were integrated to one singular category, called Sub Judges/Chief Judicial Magistrates. The integration of Officers from the Civil and Criminal Wings was made by following 3:1 ratio and 2:1 ratio, i.e. the first three places were given to the Officers from the Civil Judicial side, the fourth was given to the Officers of the Criminal Judicial side. The fifth and sixth position were given to the Officers from the Civil Judicial Service and the seventh to the Officer from the Criminal Judicial side. This amendment was brought into effect from 1-1- 1992. It is his case that the said integration with effect from 1-1-1992 and the preparation of a combined seniority list as on 1-1-1992 necessitated the preparation of a combined seniority list of Subordinate Judges/Chief Judicial Magistrates, following the ratio. It is the case of Shri K.R.B. Kaimal that when the three vacancies of District Judges arose after 1-1-1992, the High Court by Ext.P-4 order posted the three Officers as District Judges. The provision in Ext.P-4 that the appointment will be temporary without any probationary rights was incorporated in the circumstances that a combined seniority list of Subordinate Judges and Chief Judicial Magistrates had to be prepared with effect from 1-1-1992. It is, therefore, the case of the High Court that the appointment of Petitioner as District Judge was during the pendency of the preparation of the new seniority list including the Chief Judicial Magistrate, following the integration of the Civil and Criminal Wings with effect from 12-1-1992 and the appointment has to be, therefore, necessarily only temporary. It is the case of the senior counsel that, therefore, it is with reference to the dates in Exts. P-5 and P-6 that the Petitioner can claim seniority under Rule 6 of the Kerala Higher Judicial Service Rules. Counsel relied on Rule 4 also to contend that the Petitioner has commenced his probation as District Judge only after Exts.P-5 and P-6 were issued and pursuant to Ext.P-7. He would, therefore, submit that Ext. P-6 is the order of first appointment within the meaning of Rule 6. Learned senior Counsel will distinguish the decision of the Apex Court in V. Bhaskar Rao and others Vs. State of Andhra Pradesh and others, . He would point out that the Rule under consideration in the said case was different. He would point out that the Rule in the said case provided that seniority is to be determined with reference to the continuous officiation and the cadre consisted of both temporary and permanent posts and, therefore, the appointment of the District Judge to a temporary post and his officiation thereunder conferred on him seniority as against direct recruit who was appointed against a permanent post later than the promotee under a temporary post. He would point out that the Petitioner has not challenged Ext.P-6. It is, therefore, not open to the Petitioner to lay a claim to seniority under Exts.P-2 and P-3, it is submitted.

9. Shri V. Giri, learned Counsel appearing on behalf of Respondents 3 and 5 contended that the appointment under Exts.P-2 and P-3 is not in conformity with the Rule. The Rule contemplated the appointment after 1-1-1992 to be made after considering the claims of not only Subordinate Judges, but also Chief Judicial Magistrates, in view of the law as established by amendment of the Rules. He would also submit that the fact that the Petitioner has not challenged Exts.P-5 and P-6 is fatal to the case of the Petitioner. He would point out that the Petitioner commenced probation under Ext. P-6 read with Ext. P-7, and the right of the Petitioner cannot be considered ignoring Exts.P-6 and P-7. Ext. P-6 is issued by the Governor, the competent authority under law, appointing the Petitioner to the cadre of District Judge. It is not, therefore, open to the Petitioner to ignore that appointment. Exts.P-2 and P-3 on the one hand and Exts.P-5 and P-6 on the other hand, cannot square with each other and, therefore, the later in point of time alone can prevail, it is contended. Ext.P-6 is part of the very case of the Petitioner, he submits. The service is under Ext.P-6 and he cannot disown Ext.P-6 in the manner sought to be done. There cannot be multiple appointments, he contends. Therefore, it is Exts.P-5 and P-6 which alone can be considered for deciding the question of seniority. Shri V. Giri would also contend that as long as the Rules made are not in conflict with Article 233, they are binding. The appointing authority cannot go against the Rules made, he argues. He would also point out that a perusal of Exts.P-5 and P-6 would show that the Petitioner has been treated as Subordinate Judge as on the date of Exts.P-5 and P-6 and this was acted upon by the Petitioner as he has not cared to challenge it.

10. Shri Ramesh Babu, learned Counsel appearing on behalf of the fourth Respondent would contend that it was not necessary for the Respondent to challenge Exts.P-2 and P-3. He would also submit that Exts.P-2 and P-3 were issued on the basis that the Kerala Judicial Service Rules remained unaltered. In other words, he would first contend that even without considering the retrospective effect with which the Rules were amended on 29-2-1992 with effect from 1-1-1992, having regard to the fact that the foundation on which Ext.P-1 panel was prepared, had ceased to exist by the time Exts.P-2 and P-3 orders dated 14-2-1992 were issued, Exts.P-2 and P-3 would have no legal legs to stand on. This is for the reason, he contends, that by virtue of the Kerala Judicial Service Rules which is promulgated on 31-12-1991 and came into effect on 1-1-1992, Subordinate Judges came to be integrated with the cadre of Chief Judicial Magistrates. Ext.P-1 panel was prepared on the basis that the Civil Wing and the Criminal Wing were two separate Wings. In this context, he relied on the Explanatory Note at page 473 which reads as follows:

Rules issued under Notification G.O.(P) No. 190/91/Home, dated 31-12-1991 and published in K.G. Ext. No. 1518 dated 31-12-1991. Explanatory Note reads as follows: "The Subordinate Judiciary in the State consisting of District Judges, Chief Judicial Magistrates, Subordinate Judges, Munsiffs, Judicial Magistrates of the First Class, Judicial Magistrates of the Second Class, was functioning in the

matter of appointment and promotions as two separate wings, one consisting of the Kerala State Higher Judicial Service and the Kerala Civil Judicial Service and (2) the Kerala Criminal Judicial Service. The Higher Judicial Service consisted of District Judges; the Kerala Civil Judicial Service consisted of Subordinate Judges and Munsiffs and the Kerala Criminal Judicial Service consisted of Chief Judicial Magistrates, Judicial Magistrates of the First Class and Judicial Magistrates of the Second Class. The Civil Judicial Service and the Criminal Judicial Service came into being as a result of the orders issued under G.O. (Ms) 24/73/Home, dated 12-2-1973 and with that the Subordinate Judiciary was also bifurcated, for the first time as the Civil Wing and Criminal Wing. The Higher Judicial Service, all along constituted one separate service to which after the implementation of the orders in the G.O. dated 12-2-1973, only the Civil Judicial Officers are eligible to be considered. The system actually began to function, after the decision of the Supreme Court in Civil Appeal No. 2047 of 1974 dated 14-2-1978, from April, 1978. As a result of compartmentalisations, Officers without any experience at all on Criminal Judicial side had to work as Assistant Sessions Judges on their promotion as Subordinate Judges. In some cases, it was found that this had a far from desirable effect on the nature of the disposals. Another reason that persuaded the High Court to integrate the two services was to avoid stagnation to members of the judiciary on the criminal side, there being no further promotional opportunities further above the cadre of Chief Judicial Magistrates".

With the enacting of the Kerala Judicial Service Rules, 1991, category 1 consists of Subordinate Judges/Chief Judicial Magistrates while category 2 consists of Munsiff-Magistrates. He would, therefore, contend that in the context of the above background Exts.P-2 and P-3 were illegal. Even without the Respondents challenging the same, the High Court itself realised the illegality involved and it issued Ext.P-4, a fresh panel Ext.P-5 was prepared and got approved by the Governor himself following which Ext.P-6 was issued, thereby appointing the Petitioner regularly to the cadre of District Judge within the contemplation of Rule 6 of the Kerala State Higher Judicial Service Rules, he points out. He would also contend that the Petitioner not having challenged Exts.P-4, P-5 and P-6, he is bound by the said Orders. He would submit that the fact that the Petitioner has not been superseded in Ext.P-5 panel by any Chief Judicial Magistrate, would not make any difference in law. It is his case that what is important is not the result of the exercise as such, but the justifiable need for the preparation of a new panel in the light of the change in law that rendered Exts.P-2 and P-3 vulnerable giving life to Exts.P-5 and P-6. As long as the legal premise on which Exts.P-5 and P-6 are issued remained unquestionable, it is his contention that Exts.P-2 and P-3 cannot be relied on by the Petitioner to claim seniority. He would point out that in Ext P-5, Petitioner is ranked below the sixth Respondent. Of course, the sixth Respondent was a Sub Judge who was earlier overlooked at the time of preparation of Ext.P-1. As long as Ext.P-5 is not challenged, it is contended that the Petitioner is to be ranked below the sixth Respondent. It is the case of Shri Ramesh Babu that Exts.P-2 and P-3 cannot confer any right on the Petitioner

under Rule 6 of the Kerala Higher Judicial Service Rules, de hors the Rules which provided for considering the case of Chief Judicial Magistrates also. He would contend that Ext.P-1 panel, in fact, became defunct. It could not have been acted upon after 1-1-1992. There is no challenge to the retrospective effect with which the Rules stand amended, he submits. He would submit that the effect of the amendment to the Rules with effect from 1-1-1992, including the Chief Judicial Magistrates also as feeder category for promotion to the cadre of District Judges is that Exts.P-2 and P-3 cannot be relied on after the amendments came into force. If Exts. P-2 and P-3 had been in fact challenged by the Respondents, certainly the same could not have stood the scrutiny by this Court, he submits. This Court cannot now give efficacy to Exts.P-2 and P-3, it is contended. He relied on the decision of the Apex Court in Jacob Yahannan, The Administrator Dadra Nagar Haveli and Another Vs. H.P. Vora and Others, , to contend that even without the amendment to the Rules, in view of the enactment of the Kerala Judicial Service Rules, 1991, the Chief Judicial Magistrate became entitled to be considered along with Subordinate Judges for promotion to the post of District Judge. It is contended that the first vacancy arose after 1-1-1992 on 20-1-1992, i.e. after the new Rules came into force. Shri Ramesh Babu would contend that even if the Petitioner is placed senior to Respondents 3 to 5 in the cadre of District Judges, the Petitioner would not become entitled to be placed above them in the cadre of Selection Grade District Judges. He invited our attention to the prayers in the Writ Petition in this regard. It is pointed out that there was no vacancy of District Judge available at the time of issuance of Ext.P-23 or even Exts.P-2 and P-3, as the Courts were not established as on 14-1-1992.

11. The issues that arise for our consideration and decision can be summarised as follows:

- (1) Which is the first order of appointment in regard to the Petitioner which is relevant for Rule 6 of the Kerala Higher Judicial Service Rules?
- (2) Whether it is open to the Respondent High Court to give a temporary status to the appointment made by the Governor under Article 233 and also declare that the Petitioner will not have probationary rights? In other words, is it open to the High Court to take away a right which is otherwise available under Exts.P-2 and P-3 by issuing Ext.P-4?
- (3) What is the effect of the Petitioner not challenging Exts.P-4, P-5 and P-6?
- (4) What is the true effect of Article 233? Is it a complete Code in itself?
- (5) When once an appointment was made by the Governor under Article 233, can it be pronounced as without legal effect or illegal on the score that it is in violation of the Rules providing for integration of the Civil and Criminal Judicial Wings?

12. The parties referred to a plethora of case law. In order to appreciate the true legal effect of the appointment, we must consider first as to who is the

appointing authority of a District Judge under our constitutional scheme of things. The matter is no longer *res integra*. As early as in the decision in *State of Assam Vs. Ranga Mahammad and Others*, , the Apex Court took the view that the right to appoint, promote and to post a District Judge is vested with the Governor under Article 233, no doubt in consultation with the High Court. The Court took the view that the right to transfer a District Judge is, however, vested with the High Court. This decision came to be followed in *Chandramouleshwar Prasad Vs. The Patna High Court and Others*, . Of course, there, the Apex Court took the view that the appointment of a person as District Judge cannot be made by the Governor on his own initiation and he must do so in consultation with the High Court. In the facts of this case, there is no case for the Respondents that Exts.P-2 and P-3 orders were issued by the Governor without consultation with the High Court. It is clear that the panel of Subordinate Judges who alone were eligible to be Considered as on the date of Ext.P-1 was approved by the Governor. Ext.P-1 is dated 19-11-1991. When Ext.P-1 was prepared and approved, it cannot admit of any doubt that it was legal. There is no case of any mistake afflicting Ext.P-1 either. The sixth Respondent, though a Subordinate Judge, was considered, but overlooked, apparently on the basis that he was not upto the mark. The first person mentioned in Ext.P-1 panel, namely Shri James J. Muricken, was in fact, appointed as District Judge, no doubt, prior to 1-1-1992. Nobody has a case that the appointment of Shri James J. Muricken who is at SI. No. 1 in Ext.P-1 approved panel of Subordinate Judges is in any way illegal. Exts.P-2 and P-3 cannot be questioned on the ground that Ext.P-1 panel on the basis of which Exts.P-2 and P-3 are issued suffers from the vice that it falls foul of the constitutional mandate that the appointment be made in consultation with the High Court. We would also think that there is merit in the contention of the Petitioner that there does not appear to be anything on record to suggest that during the process of consultation between the Governor and the High Court leading upto Exts.P-2 and P-3, it was contemplated by either the appointing authority or by the High Court that appointment was not to be regular or that it was to be of a temporary nature. In this context, the contention of the Petitioner based on Ext. P-23 cannot be overlooked. Ext.P-23 would show that three posts of District Judges had to be created consequent upon the direction issued by the Apex Court in the context of the mark list cases. Government of Kerala proceeded to sanction the creation of three posts of District Judges. It is the case of the Petitioner that what is crucial in the context of Rule 6 is the date of first appointment to the cadre of District Judge. It is not the day on which the appointee is actually assigned work that determines seniority, it is contended. Petitioner, of course, joined duty subsequently on 7-3-1992. But, what is clinching is the date of Exts.P-2 and P-3, namely 14-1-1992 for the purpose of seniority, he contends. We have to deal with the terms of Ext.P-4. In Ext.P-4, the High Court has proceeded to direct that the posting of the Petitioner as District Judge will be temporary and without probationary rights. It is further directed that right to seniority will be determined later. Three questions will arise in the wake of Ext.P-4. Firstly, was the High Court clothed with the authority to issue in

order in the nature of Ext.P-4 containing directions as aforesaid? If it is found that the High Court was unauthorised in issuing Ext.P-4, what is the effect of the Petitioner acting upon Ext.P-4, and not challenging the same to the extent it is found unauthorised. Lastly, what is the effect of Exts.P-5, P-6 and P-7 being acted upon. Coming to the first question as to whether it was open to the High Court to treat the posting as temporary, this question cannot be answered except without delineating the lines demarcating the authority vested with the Governor on the one hand and the High Court on the other. There can be no doubt, in the light of the decisions which we have referred to, that the Constitution contemplates the Governor as the appointing authority. The Governor can appoint a person as District Judge only in consultation with the High Court. No doubt, it may be correct that the High Court acted entirely bona fide at the time when Ext.P-4 was issued, since the amendment including Chief Judicial Magistrates in the feeder category for promotion as District Judges, was not only on the anvil, but, in fact, it was published on the same day in the Kerala Gazette with retrospective effect from 1-1-1992. But, the question arises whether it was open to the High Court to direct that the posting will be temporary. The basis of the High Court dubbing the posting as temporary and directing that the Petitioner will be without probationary rights was apparently the amendment to the Rules as we have already noticed. We are inclined to think that right to seniority is a matter governed by statutory Rule, namely Rule 6 of the Kerala Higher Judicial Service Rules. The Rules unambiguously declare that seniority will be determined on the basis of the date of the first order of appointment. If that be so, we are of the view that the statement in Ext.P-4 order issued by the High Court would appear to be without authority in law. Neither in Ext.P-2, nor in Ext.P-3 is there any indication by the appointing authority, namely the Governor, that the appointment of the Petitioner is temporary. As we have already found, there is nothing in the process of consultation between the Governor and the High Court to indicate that the appointment was intended to be a temporary affair. There is nothing to indicate in either the process of consultation or in Exts.P-2 and P-3 that the appointment of the Petitioner was not intended to be a regular appointment. Apparently, the Registry of the High Court took the stand that in the light of the direction of the Apex Court, it was necessary to fill up three vacancies and that temporary appointments could be made without any claim for seniority. A meeting of the Administrative Committee was convened on 11-2-1992. It considered the matter and it made the recommendations hereinbefore extracted. The matter was placed before the Full Court Meeting on 21-2-1992. The Full Court approved the recommendations. It is thereafter that Ext.P-4 order dated 29-2-1992 came to be issued. Going by the second recommendation apparently the High Court decided that it must be treated as having decided in view of the Full Court accepting the recommendations of the Administrative Committee that the appointment of those who were appointed from the panel after 1-1-1992 may be treated as temporary without probationary rights, and further it was decided that their seniority in the category be decided after a fresh panel is prepared.

13. We would think that any pronouncement on the legality of the High Court rendering the posting of the Petitioner as temporary and to be without probationary rights would not be decisive of the matter, in view of the fact that Ext.P-4 itself was not only accepted by the Petitioner and he joined duty pursuant thereto, but also in view of the subsequent developments which are as follows:

Ext.P-5 was issued approving a fresh panel consisting both of Subordinate Judges and Chief Judicial Magistrates in purported compliance with the mandate of the Rules as amended. Ext P-5 is dated 15-7-1992. No doubt, Petitioner is described as a Subordinate Judge which, of course, was not correct, as on the date of the same, Petitioner stood appointed a District and Sessions Judge. Ext.P-5 is followed by Ext.P-6 dated 15-7-1992 by which the Petitioner is appointed as District and Sessions Judge. It is further followed by Ext.P-7 dated 31-7-1992 of the High Court posting the Petitioner as District and Sessions Judge. Ext.P-7, of course, directs that the Petitioner who is working as District Judge temporarily will continue to hold the post. Petitioner commenced his probation only after Exts.P-5 and P-6, namely on 31-7-1992. Exts.P-5 and P-6 are orders issued by the authority competent to make the orders under Article 233 of the Constitution. Petitioner without any demur accepted the same. The probation was commenced with effect from Ext.P-7 Order, namely 31-7-1992. A perusal of Rule 4 of the Rules which we have already extracted, when it is read in conjunction with Rule 6, would give us the impression that an order of first appointment to the category No. 2, namely District Judge is to be followed by a period of probation of two years on duty within a continuous period of three years. In other words, every order of first appointment within the meaning of Rule 6 brings in its train the concomitant result that the appointee is to be on probation for a period of two years. This result, we feel, is inevitable on a harmonious reading of Rules 4 and 6. This is a circumstance which we cannot overlook in deciding the question as to whether Exts.P-2 and P-3 dated 14-1-1992 are to be held to be the order of first appointment, when admittedly, in the light of Ext.P-4, Exts.P-2 and P-3 orders of appointment were not followed by a period of probation as contemplated in Rule 4 whereas on the heels of Exts.P-5, P-6 and P-7, Petitioner entered upon a period of probation with effect from 30-7-1992, leading upto the declaration of probation with effect from 30-7-1994. Had the matters ended with Ext.P-4, it is quite possible that we could have taken the view that the conditions imposed on the Petitioner's appointment therein should not militate against his claiming seniority on the strength of Exts.P-2 and P-3. But here, we cannot ignore Exts. P-5, P-6 and P-7. In this context, we would like to deal with the contentions of the learned Counsel for the Petitioner based on the decisions of the Apex Court and this Court which lay down that it is open to a party to a litigation, particularly a Respondent, to set up the invalidity of the regulation by a piece of subordinate legislation on the score of its palpable invalidity without mounting a challenge to the same. We are inclined to find that it cannot be open to the Petitioner to draw any sustenance

from the principles laid down therein and to avoid the consequence of the Petitioner failing to challenge Exts.P-4, P-5 and P-6. In the aforesaid decisions, the Court was dealing with the case of a patent lack of authority in the making of a regulation. This Court in *Usman Vs. State of Kerala*, has held as follows:

It is well-settled that the invalidity of a legislation can be set up as a defence in civil proceedings and in that event, the Trial Court is bound to refer the point for the decision of the High Court u/s 113 of the CPC See the decision of the Apex Court in *Raja Ganga Pratap Singh Vs. The Allahabad Bank Ltd., Lucknow*, . In writ proceedings, if a subordinate legislation is sought to be enforced, the Respondents can resist the same pleading that the said Regulation is invalid. He need not seek separate and independent prerogative remedy to challenge the same. See the decision of the Apex Court in "*Bharathidasan University v. All India Council for Technical Education*" (2001 (8) S.C.C. 676). In the said decision, the Apex Court held as follows:

The fact that the Regulations may have the force of law or when made have to be laid down before the legislature concerned does not confer any more sanctity or immunity as though they are statutory provisions themselves. Consequently, when the power to make regulations is confined to certain limits and made to flow in a well defined canal within stipulated banks, those actually made or shown and found to be not made within the confines but outside them, the courts are bound to ignore them when the question of their enforcement arises and the mere fact that there was no specific relief sought for to strike down or declare them ultra vires, particularly when the party in sufferance is a Respondent to the lis or proceedings cannot confer any further sanctity or authority and validity which it is shown and found to obviously and patently lack".

14. Exts.P-4, P-5 and P-6 are orders issued by the appointing authority under Article 233 of the Constitution, and the High Court. Even proceeding on the basis that Ext.P-4 contained conditions which are beyond the power of the High Court in the context of Article 233, we do not think that it is open to the Petitioner to ask us to simply ignore Exts.P-5, P-6 and P-7, We note that Exts.P-5 and P-6 are issued by none other than the very authority who is invested with the legal power under Article 233. It may be true that if it were in challenge before us, we may have had to go into the question as to whether it is legal and fair. But, in the absence of any such challenge, we must proceed on the basis that the orders are valid. An order which is left unimpugned stares one at his face. This is not a case where we could say that the preparation of a fresh panel and its approval by the Governor in the wake of the Kerala Judicial Service Rules, 1991 or the change in the Rules is without any basis at all. We cannot say that the preparation of the panel and the issuance of Exts.P-5 and P-6 are wholly without any reason and hence arbitrary. In such circumstances, we are of the view that in the facts of this case, it is Ext.P-6 which must be treated as the order with reference to Rule 6, which is relevant and Ext.P-6 must be treated as the order of first appointment of the Petitioner. It is quite clear that there can only be one order of

first appointment in law with reference to which seniority can be established under Rule 6. Such first order of appointment of the Petitioner, in our view, in the facts of this case, can only be Ext.P-6. In such circumstances, we find no merit in the Writ Petition and it is dismissed.