

(1969) 02 GAU CK 0002
In the Gauhati High Court
Case No : Civil Rule No. 222 of 1968

Kuseswar Saikia and others

APPELLANT

Vs

State of Assam and others

RESPONDENT

Date of Decision : 05-02-1969

Acts Referred:

Constitution of India, 1950 — Article 132(1), 165, 229, 229(1), 233

Citation : AIR 1969 Guw 128

Hon'ble Judges : S.K. Dutta, C.J.; K.C. Sen, J

Bench : Division Bench

Advocate : S.N. Bhuyan, N.N. Saikia and D.P. Chaliha, for the Appellant; B.C. Barua, Advocate General and G.K. Talukdar, Sr. Govt. Advocate, for the Respondent

Judgement

S.K. Dutta, C.J.—This is a petition in which a writ of Quo Warranto is prayed for. The petitioners have been convicted in a sessions case by Shri U.N. Rajkhowa, District & Sessions Judge, Darrang. Their case is that Shri Rajkhowa is not entitled to hold the post of District and Sessions Judge, Darrang. The following are the admitted facts. Both the posts of the Subordinate Judge and the Deputy Registrar of the High Court were borne in the Assam Judicial Service (Junior) Grade I. Shri Rajkhowa who was a Munsif in Grade II of the said Service was appointed to be the Deputy Registrar by the then Chief Justice under Article 229 of the Constitution.

After he served a few years as Deputy Registrar, the Governor of Assam appointed him to officiate as Additional District and Sessions Judge, Lower Assam Districts at Nowgong by the following notification:

Dt. 19-6-67.

No. LJJ. 74/66/55 - The services of Sri U.N. Rajkhowa, Deputy Registrar, High Court of Assam and Nagaland being replaced at the disposal of the Govt, the Governor of Assam in consultation with the High Court of Assam and Nagaland,

and in exercise of powers conferred by Article 233 of the Constitution read with Rule 5(ii) of the Assam Judicial Service (Senior) Rules, 1952 is pleased to appoint Sri Upendra Nath Rajkhowa to officiate as Additional District and Sessions Judge, Lower Assam Districts with Headquarters at Nowgong with effect from the date he takes over as such vice Shri M.C. Mahajan.

Sd. B. Sarma, Secy., to the Govt. Law Department.

2. Then after a month or so, Sri Rajkhowa was appointed by the Governor of Assam to be the District and Sessions Judge of Darrang District by the following notification:

Dt. 28th July, 1967.

No. LJJ. 94/67/14 - In exercise of the powers conferred by Article 233 of the Constitution read with Rule 5 (ii) of the Assam Judicial Service (Senior) Rules 1952, the Governor of Assam and Nagaland, is pleased to appoint Sri Upendra Nath Rajkhowa, Additional District and Sessions Judge, Nowgong, to officiate as District and Sessions Judge of Darrang District with Headquarters at Tezpur

with effect from 14th August, 1967 or the date on which he takes over as such, whichever is later.

Sd. B. Sarma, Secy. to the Govt Law Department

3. It is submitted by the petitioner that although the notifications say that Sri Rajkhowa was "appointed", in fact he was "promoted" firstly from the post of Deputy Registrar to that of the Additional District and Sessions Judge and secondly from the post of Additional District and Sessions Judge to the post of District and Sessions Judge. It is further contended that this right to promote a person holding a post which is in the State Judicial Service and inferior to the post of a District Judge, vests in the High Court under Article 235 of the Constitution. Hence it was the High Court which should have promoted Sri Rajkhowa. The Government having no authority to promote him, his promotions are void ab initio.

4. The provisions relating to the appointment, promotion of and control over the Subordinate Judicial Officers are laid down in Chapter VI of Part 6 of the Constitution of India. They are as follows:

233. (1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

234. Appointments of persons other than district judges to the judicial service of

a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.

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

286. In this chapter-

(a) the expression "district judge" includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, Chief Judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge;

(b) the expression "judicial service" means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial post inferior to the post of district judge.

237. The Governor may by public notification direct that the foregoing provisions of this Chapter and any rules made thereunder shall with effect from such date as may be fixed by him in that behalf apply in relation to any class or classes of Magistrates in the State as they apply in relation to persons appointed to the judicial service of the state subject to such exceptions and modifications as may be specified in the notification.

5. The Assam Judicial Service was constituted by the Government of Assam by a notification dated the 25th August, 1952 and designated as "State Judicial Service". Then by a notification No. JJD. 50/51/24 certain Rules were made called the Assam Judicial Service Rules 1952. These Rules were made applicable only to what was called the State Judicial Service (Senior) which was constituted as follows;

Senior Grade I

(1) Registrar.

(2) Legal Remembrancer,

(3) District Judges.

Senior Grade II

Additional District Judges.

6. Thereafter on the 9th of April 1954 the State Judicial Service (Junior) was created. Rules in respect of this Service were made by the notification No. LJJ. 84/54/168. This Service was constituted as follows:

Junior Grade I

(1) Subordinate Judges, (2) Deputy Registrar.

Junior Grade II.

(1) Munsiffs.

(2) Assistant Registrar.

7. The appointment of District Judges as well as the appointment of persons other than District Judges to the Judicial Service of a State is made by the Governor vide Articles 233 and 234 of the Constitution. According to the learned Advocate General, the Assam Judicial Service (Senior) and Assam Judicial Service (Junior) are two distinct Services and the appointment of a Subordinate Judge to be the Additional District Judge is not a case of promotion but of appointment. It is difficult to accept this contention of the learned Advocate-General. If this was so, then the Government by including the post of a Subordinate Judge as a Grade III post in the Assam Judicial Service (Senior) could say that when a Munsiff was appointed as a Subordinate Judge, it was a case of appointment and not of promotion. In such a case the power of promotion given to the High Court under Article 235 would become meaningless.

The Bengal, Agra and Oudh Civil Courts Act (hereinafter called the Civil Courts Act) established four classes of Civil Courts in Assam, viz. Court of District Judge, Court of Additional District Judge, Court of Subordinate Judge and Court of Munsiff Appeal lies from the Court of the Subordinate Judge to the Court of the District Judge if the value of the original suit does not exceed Rs. 7000/-. As pointed out by the Supreme Court in *The High Court, Calcutta Vs. Amal Kumar Roy*, -

In the hierarchy of the Courts of a District, the Court of Subordinate Judge is higher in rank than the Court of a Munsiff which stands at the bottom." I may only add that in the said hierarchy, the Court of a Subordinate Judge is lower in rank than the Court of an Additional District Judge.

8. Sri Rajkhowa was holding the post of Deputy Registrar which was in the State Judicial Service and equivalent to the post of a Subordinate Judge. His appointment to the post of an Additional District Judge was a promotion in the State Service viz. the State Judicial Service and under Article 235 of the Constitution this promotion could be given only by the High Court and not by the Government.

9. It may further be noted that Rule 5 of the Assam Judicial Service Rules 1952 stated as follows:

5. Recruitment.- (i) The Chief Justice of the High Court shall fill up the post of the Registrar by virtue of Article 229(1) of the Constitution of India preferably from Grade I or Grade II of the service.

(II) Other posts of the cadre shall be filled up by the, Governor in consultation with the High Court Provided that not more than one-third of the posts in each Grade of the Cadre may be filled up by direct recruitment. The rest of the posts in Grade I and Grade II of the Cadre shall be filled up by promotion from Grade II of the Cadre and from Grade I of the Assam Judicial Service (Junior) respectively.

10. It will be seen that the above Rule provided for filling up of one-third of the posts of Additional District Judges in Grade II of Assam Judicial Service (Senior) by direct recruitment and the rest by promotion from the posts of Subordinate Judges which were in Grade I of Assam Judicial Service (Junior). Therefore, the provision for promotion from the post of a Subordinate Judge to the post of an Additional District Judge was there in the above Rule. The learned Advocate-General points out that under the Rule except the post of Registrar, all other posts of the Judicial Service I (Senior) are to be filled up by the Governor. But as the power to promote a person holding a post in the State Judicial Service, inferior to that of a District Judge vests in the High Court under Article 235 of the Constitution, the above Rule must be held to be invalid so far as it gives that power to the Governor.

11. It appears that the Government realised the weakness of their claim that they had the power to promote a Subordinate Judge simply by treating the promotion as an appointment. Hence the Civil Courts Act was amended by the Assam Act XII of 1967 which was brought into force on the 16th of August 1967. By this amendment, the designation of "Subordinate Judge" was altered to "Assistant District Judge". On the 17th August, 1967, that is one day later, the new Assam Judicial Service Rules 1967 were brought into force. In it the Assam Judicial Service was constituted as follows:

Grade I.

- (1) District & Sessions Judge.
- (2) Registrar.
- (3) Presiding Officer, Industrial Tribunal.
- (4) Presiding Officer, Labour Court

Grade II.

- (1) Additional District Magistrate.
- (2) Assistant District Judge.
- (3) Deputy Registrar.

Grade III

- (1) Munsiff.
- (2) Judicial Magistrate.
- (3) Sub-Divisional Magistrate (Judicial).
- (4) Assistant Registrar.

12. The change in the designation was made not to enhance the prestige of the Subordinate Judges who had been always pressing for better conditions of service and not for better designation. Under Article 236 the expression "District Judge" includes an "Assistant District Judge". So obviously the alteration in the designation was made so that the promotion of a Subordinate Judge, redesigned as Assistant District Judge, might not be treated as the promotion of a person holding a post inferior to that of a District Judge. Such a subterfuge to get the power of promoting a Subordinate Judge to the post of an Additional District Judge is clearly a fraud on the Constitution. It is true that under Article 236 the expression "District Judge" includes Additional District Judge, Joint District Judge, Assistant District Judge etc.

When the Constitution came into force, such Additional District Judges, Joint District Judges and Assistant District Judges existed in certain provinces under their respective Acts. For example, under the Bombay Civil Courts Act 1869 there were Joint District Judges and Assistant District Judges in the Bombay Presidency. An Assistant District Judge could be invested with all the powers of a District Judge in respect of a particular area and if he was so invested the jurisdiction of the District Judge ceased in that area. In Assam there was no such Assistant District Judge. Assistant District Judge, Additional District Judge, Joint District Judge etc. mentioned in Article 236 of the Constitution must mean these posts as they existed at the time the Constitution came into force. For example, Article 236 includes within the definition of District Judge, a Judge of a City Civil Court. The Government cannot by changing the designation of the Munsiff to a "Judge of the City Civil Court", take away the power of the High Court to promote a Munsiff to the post of a Subordinate Judge. In the result therefore I hold that the power to promote a Subordinate Judge to the post of Additional District Judge is of the High Court. This power continues even though the designation of a "Subordinate Judge" has been altered to "Assistant District Judge".

13. Next I may take the question of appointment of an Additional District Judge as District Judge. The question is whether such an appointment is a promotion. An Additional District Judge is included in the definition of a District Judge under Article 236. Additional District Judges were there in this State when the Constitution came into force. There cannot be a promotion from a post which is to be treated as the post of a District Judge to a post of a District Judge. Hence the appointment of an Additional District Judge as a District Judge is an appointment pure and simple and not a promotion. Such an appointment has to

be made by the Governor in consultation with the High Court under Article 233 of the Constitution. I may summaries by conclusions as follows:

(1) Appointment "to be" a District Judge is to be made by the Governor in consultation with the High Court, vide Article 233.

(2) Promotion "of" a District Judge and not promotion "to be a District Judge" is also to be made by the Governor in consultation with the High Court, vide Article 233. In many States there is Selection Grade for District Judges. Appointment of a District Judge to the Selection Grade will be promotion of a District Judge.

(3) Promotion of a person-

(a) belonging to the State Judicial Service.

(b) holding a post inferior to that of a District Judge is to be made by the High Court.

"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 and holding any post inferior to that of the District Judge," The High Court, Calcutta Vs. Amal Kumar Roy, .

(4) Appointment to a post in the Judicial Services other than that of a District Judge is to be made by the Governor in accordance with Rules framed under Article 234.

(5) The various posts included in the expression "District Judge" under Article 236 of the Constitution are the posts which existed under those designations at the time of coming into force of the Constitution. The Government cannot take away the power of the High Court to promote a Subordinate Judge to the post of Additional District Judge simply by changing the designation of the Subordinate Judge to "Assistant District Judge". Legislation making such a change is colourable and a fraud on the Constitution. It may, however, be noted that when Sri Rajkhowa was appointed as Additional District Judge from his post of Deputy Registrar, the designation of the Subordinate Judge was not yet altered to Assistant District Judge.

14. In the result Sri Rajkhowa is not entitled to hold the post of District Judge as his initial promotion to the post of Additional District Judge is void ab initio. It may, however, be noted that Sri Rajkhowa was also appointed by the Government as Additional Sessions Judge and then as Sessions Judge. These posts were not in the Judicial Service. They are included in the expression "District Judge" under Article 236. The Government being entitled to make these appointments in consultation with High Court under Article 233 read with Article 236, Sri Rajkhowa was appointed to these posts by the competent authority and he could hold them. He could not hold the post of District Judge only. He was entitled to hold the post of Sessions Judge.

15. In giving my interpretations of Articles 233 to 236, I have borne in mind, the

policy adopted by the Constituent Assembly and displayed in those Articles. The Supreme Court in the case of *The State of West Bengal Vs. Nripendra Nath Bagchi*, traced the history of Articles 233 to 237 and pointed out that the trend had been to separate the Judiciary from the Executive. In the said case the Supreme Court interpreted the word "control" in Article 235 and held that the control of the High Court over the subordinate judiciary meant complete control. It observed that "to hold otherwise will be to reverse the policy which has moved determinedly in this direction."

Similarly an ingenious interpretation should not be adopted of the word "promotion" in that Article to deprive the High Court of its power. The intention of the Constituent Assembly was clear that at least the Judicial officers holding posts inferior to that of a District Judge, should entirely look to the High Court and not to the Executive authority for their future prospects. In interpreting the said word, the weight should be in favour of this intention of the Constitution-makers.

16. It appears to be rather surprising that whereas the declared policy of the Government of Assam is to achieve complete separation of the Judiciary from the Executive, It should bring a colorable legislation to deprive the High Court of powers given to it by the Constitution. It is unbelievable that the Government would take actions which go counter to their policy. It is obvious that the Secretary of the Law Department must have misled the Government. In this connection, I like to draw the pointed attention of the Government to what the Supreme Court said in the case of *State of Assam Vs. Ranga Mahammad and Others*, . In that case the Government refused to transfer a District Judge as recommended by the High Court and the question arose whether the Government or the High Court had the power to transfer a District Judge. This Court held that the High Court alone had that power and this decision was upheld by the Supreme Court The Supreme Court observed: "This is not the first time when cordiality was ruined because a Secretary's name was suggested by the Minister and was not acceptable to the High Court" In the said case this Court had occasion to remark that in the matter of the transfer of a District Judge, the Government "acted mala fide throughout".

In their appeal to the Supreme Court, the Government prayed that the above remark should be expunged. While refusing to do so the Supreme Court pointed out how a frustrated Secretary could spoil the cordial relationship between the High Court and the Government The Supreme Court also gave a note of warning that a Secretary might withhold vital information's from a Minister when he was personally interested in the matter. The learned Advocate-General contends that the power to promote a judicial officer given by Article 235 of the Constitution to the High Court, means the power to promote a Munsiff. If the High Court cannot promote a Munsiff even, this power given by the said Article becomes nugatory. But there is R. 5(4)(b) of the Assam Judicial Service Rules 1967 giving this power also to the Government If the learned Advocate-General finds this rule to

be inconsistent with the stand taken by him before us it is his duty to point out the position to the Government. Rule xiv of the Rules framed under Clauses (2) and (3) of Article 165 of the Constitution of India, assigning duties to the Advocate-General says as follows:-

The Advocate-General shall report to Government any flaws in legal enactments and any facts arising therefrom or in connection with cases conducted by him which he thinks, or the High Court desires, should be brought to the notice of the Government.

17. Lastly, as regards the prayer for setting aside the judgment given by Sri Rajkhowa, it may be said that this question cannot be examined In a petition for Quo Warranto. Therefore, we should give no decision on the question in this petition whether the judgments given by Sri Rajkhowa as a District Judge are void. I may, however point out that the impugned judgment was given by Sri Rajkhowa not In his capacity as a District Judge but in his capacity as a Sessions Judge. The petition is allowed Partially and it is directed that Sri Rajkhowa is not entitled to hold the post of District Judge. But he was appointed by the competent authority to the post of Additional Sessions Judge and then to that of Sessions Judge. He will continue to hold this post There will be no order as to costs.

K.C. Sen, J.

19. I agree.

20. Leave to appeal to the Supreme Court is granted under Article 132(1) of the Constitution of India, as prayed for, as the case involves a substantial question of law as to the interpretation of the Constitution.

21. The prayer for stay of operation of the order is rejected.