

(1974) 02 KL CK 0011
In the High Court Of Kerala

M.K. Krishnan Nair

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 08-02-1974

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 233, 234, 235
Criminal Procedure Code, 1973 (CrPC) — Section 10, 12, 13
General Clauses Act, 1897 — Section 21

Citation : (1974) 2 LLJ 130

Hon'ble Judges : V.P. Gopalan Nambiyar, J; George Vadakkal, J

Bench : Division Bench

Judgement

V.P. Gopalan Nambiyar, J.—As amended by C. M. P. No. 14540 of 1973, this writ petition seeks to quash Ext. P1 G.O. bifurcating the judicial service of this State into two branches as civil and criminal, and Ext. P2 G.O. implementing Ext. P1 decision, and the two sets of Rules formulated for the two wings of the judicial service thus formed, copies of which have been produced with the additional counter-affidavit of the 1st respondent dated 26th November, 1973, as annexures III and IV. The writ petition was heard and arguments were closed on 5-12-1973. A copy of the report of the Committee, presided over by Justice Sinkaran, and of which Justice Raman Nayar of this Court was also a member (in connection with the separation of the executive from the judiciary) was felt to be necessary and for this purpose, the matter was posted "To be spoken to" on 11-12-1973, and adjourned to 19-12-1973 and to 1-1-1974. When it came on for hearing on that day, it was represented that a copy of the judgment of the Supreme Court delivered on 20-12-1973 in Civil Appeal Nos. 2629 and 2630 of 1969 and 304 and 305 of 1972 against the Full Bench judgment of this Court in P.S. Menon Vs. State of Kerala and Others, , would be material. At the request of the learned Advocate. General, the matter was adjourned for its production, successively to 18-1-1974 and then to 22-1-1974, on which date, counsel made their submissions in the light of a copy of the judgment of the Supreme Court which had by then been received, and the case was finally closed.

2. The petitioner was appointed as munsif in the Kerala Judicial Service on 10-6-1958 and confirmed with effect from 1-4-1970. While serving as munsif, he was posted as Sub-Divisional Magistrate, Alwaye, and was for sometime in additional charge of the post of District Magistrate from 16-1-1963 to 31-1-1963. He was transferred and posted as Munsif, Vaikom, promoted as Sub-Judge on 3-10-1968, and subsequently confirmed in that post, and then transferred and posted as Appellate Authority for Land Reforms at Kozhikode.

3. In order to understand the scope of the controversy agitated in this writ petition, the history of the Statutory Rules and the Government Orders relating to the separation of the Judiciary from the Executive, leading finally to the bifurcation into the two wings of the judiciary, now complained of, may briefly be noticed. The Travancore-Cochin Judicial Service Recruitment of Munsifs Rules, 1953 were issued under Articles 234 and 238 of the Constitution of India. Rule 2(b) of the said Rules specified the qualifications for recruitment as Munsifs. It is enough to notice that these Rules do not specify Magistrates either as a feeder category or as a category for recruitment. In deference to the directive principles of State policy embodied in Article 50 of the Constitution, for separating the Judiciary and the Executive, steps had been taken in the State of Madras to bring about such a separation. The details of the steps so taken, and the Government Orders passed and issued for the purpose, would be found noticed in detail in *Devasahayam v. State of Madras* AIR 1958 Mad. 53. The Malabar area of this State to which these proceedings of the Madras Government were applicable, became part of this State, on and from 1-11-1956. Even before that date, instructions for separating the Judiciary from the Executive had been issued by the Travancore-Cochin Government. Under Order No. CJ. 3-12614/54/CS. dated 29th April, 1955, the separation of the Judiciary from the Executive was to be from 1-5-1955. A scheme of separation had also been drawn up by Order No. CJ. 3-12614/CS. dated 15-3-1955. The Judicial Magistrates were to consist of (1) District Magistrates; (2) Sub-Divisional Magistrates, and (3) Sub-Magistrates. Administratively and judicially the District Magistrates were to be under the control of the High Court. A notification dated 28-7-1955 was issued under Articles 237 and 238 of the Constitution of India, stating that the provisions of Article 235 of the Constitution would be applied to all Sub-Divisional Magistrates and to all Subordinate Magistrates. We may here notice the provisions of Articles 235 - 237. Article 235 vests the control over the District Courts and Courts subordinate thereto, including the posting and promotion of, and the grant of leave to, persons belonging to Judicial Service of the State and holding any post inferior to that of a District Judge, in the High Court. Article 236 reads:

236. Interpretation-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 magistrates, 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 posts inferior to the post of District Judge.

Article 237 enables the Governor by notification to direct that the provisions of Chapter VI of the Constitution (in which occur Articles 234 - 236) shall apply in relation to any class or classes of Magistrates in the State as they apply to persons appointed to the judicial service, subject to such exceptions and modifications as may be specified. Article 238 of the Constitution (now repealed) enabled the power to be exercised by the Raj Pramukh in a Part B State. After the notification dated 28-7-1955 was issued, Rule 2 of the Travancore-Cochin Judicial Service Recruitment of Munsifs Rules, 1953, was amended on 26-6-1957, so as to bring in, inter alia, Stipendary Magistrates also as a category for appointment of Munsifs. By G.O. MS. 368 dated 28-4-1959, issued under Article 237 of the Constitution, the Governor of Kerala directed that with effect from 1st May, 1955, the provisions of Article 234 of the Constitution shall apply to all Judicial Magistrates, and of Article 235, to the District Magistrates of the State. Article 234, it may be noted directs that appointment of persons other than District Judges to the Judicial Service of State, shall be made by the Governor in accordance with the Rules made by him, after consultation with the Public Service Commission and with the High Court. By G.O. (P) 383/ Home dated 5th May, 1959 the Government referred to the earlier Travancore-Cochin G.O. dated 29-4-1955 (referred to earlier) and to a G.O. dated 29-4-1952 issued by the Madras Government for separation of the Judicial and Executive Magistrates in the Madras State, which had application in the Malabar area. In supersession of the instructions contained in these G.Os. the Government issued revised instructions defining the powers of the Judicial and Executive Magistrates, Paragraph 7 of these instructions noted that the Judicial Magistrates would consist of: (1) District Magistrates; (2) Sub-Divisional Magistrates ; and (3) 1st Class Magistrates and Sub-Magistrates. Paragraph 10 stated that administratively and judicially, the District Magistrates will be subordinate to the High Court and the power of the appointment, transfer, and of investiture of Magisterial power will be with the Governor acting on the recommendation of the High Court. This was followed by G.O. M.S. 850/Pub. Integration Department dated 24-9-1959 published in the Gazette dated 6th October, 1959 issued under Article 234 of the Constitution. The said Rules directed by Rule 1, that salaried Magisterial Officers of the former Travancore-Cochin State in the categories of District Magistrates and Sub-Divisional Magistrates Grade I and II shall be eligible for appointment to the categories of Sub-Judges and Munsifs, in the Civil Judicial posts, provided they possessed the requisite qualifications. Rule 2 provided that the District Magistrates and Sub-Divisional Magistrates of Travancore-Cochin, appointed as Sub-Judges and District Munsifs had to undergo probation. This had been preceded or accompanied by G.O. MS. 851/Pub. (Integration) dated 24-9-1959. That G.O. recalled that the High Court had

expressed the view that it will not be proper to equate the District Magistrates and Sub-Divisional Grade I and II of Executive origin belonging to the Travancore-Cochin Branch with the Civil Judicial Officers, and had suggested that the two should be kept separate until the Magisterial Officers are inducted into the Civil Judiciary in the manner prescribed in Article 234 of the Constitution. The Government recorded its agreement with the High Court and ordered that the District Magistrates and Sub-Divisional Magistrates referred to will not be integrated with the Judicial Officers as on 1-11-1956 or promoted to posts in the Civil Judiciary. Three posts of District Magistrates and eight posts of Sub-Divisional Magistrates were constituted as a separate wing outside the Civil Judiciary to enable the then incumbents to continue in the posts. These three posts of District Magistrates were also set apart exclusively for the promotion of the eight Sub-Divisional Magistrates. The posts thus set apart outside the sphere of Civil Judiciary (three posts of District Magistrates and eight posts of Sub-Divisional Magistrates) were to cease to exist when the then incumbents vacated them, by retirement or promotion or otherwise. Suitable Civil Judicial posts were to be created in their place where necessary. It was also directed that such of the District Magistrates and Sub-Divisional Magistrates of Travancore-Cochin Branch as may be found by the High Court as suitable will be taken to the Civil Judiciary as and when opportunities occur. In order to enable the High Court to do this, it was stated that the necessary rule under Article 234 of the Constitution was being issued separately. The necessary rule under Article 234 to which reference is made, was, G.O. MS. 850, which we have noticed. The object sought to be achieved by the G.O. MS. 851 and the Rule issued under Article 234, was to allow the three posts of District Magistrates and eight posts of Sub-Divisional Magistrates to taper off and wither away when they became vacant, by promotion, retirement or otherwise of their then incumbents, who may be absorbed, if found suitable, into the Civil Judiciary under the newly issued rules.

4. The next step came with the State Higher Judicial Service Rules dated 11-7-1961 issued under Article 233 and the proviso to Article 309 of the Constitution. The service consisted of the District and Sessions Judge including Additional District and Sessions Judge. The District Judges were to be appointed by promotion from the category of Subordinate Judges and by direct recruitment from the Bar. This was, be it noted, after the District Magistrates, had become eligible for being appointed Sub-Judges by Rule (G.O, MS. 850 dated 24-9-1959) issued under Article 237. After these Rules came into force, the Governor again issued a Notification G.O. MS. 718/Home dated 16-12-1961, directing that with effect from 1st November, 1956, the provisions of Article 234 and 235 of the Constitution shall apply to all the classes of Judicial Magistrates as they apply to persons appointed to the judicial service of the State.

5. Next came the Kerala Subordinate Magisterial Service Rules, 1962, dated 30th April, 1962. By Rule 5, the Service was to consist of Additional 1st Class Magistrates and Sub-Magistrates. By Rule 23, posting and transfers of members of the service was to be by the High Court. A note to the Rule stated that

appointments u/s 12 of the Criminal Procedure Code in the District to which the Magistrate is to be posted, was to be made by the State Government.

5-A. By ad hoc Rules dated 11-2-1966 under Article 234 and 309 of the Constitution, meant to further the object of absorption of the excluded Magisterial Officers into the Civil Judicial posts, it was provided that the date of commencement of continuous service in the cadre of District Magistrates, shall be the date of first appointment as Sub-Judges. and of Sub-Divisional Magistrates, the date of first appointment as Munsifs. It was provided that Magisterial Officers of the former Travancore-Cochin State holding the posts of District Magistrates shall be eligible for appointment as Sub-Judges and those holding the posts of Sub-Divisional Magistrates shall be eligible for appointment as Munsifs. Persons so appointed were to become members of Kerala State Judicial Service.

6. Next in sequence is the State Judicial Service Rules, 1966 promulgated on 5-10-1966. By Rule 5, the State Judicial Service consists of Subordinate Judges, which terms shall include Sub-Judges posted as District Magistrates (Judicial); and Munsifs, which term shall include Munsifs posted as Sub-Divisional Magistrates. By Rule 20, the posting and transfers of Members of the Service shall be by the High Court, and investiture u/s 12 of the Cr. P. C. by the Government.

7. It was while the matters stood thus, that after a fairly prolonged and protracted correspondence with the High Court, Ext. PI G.O. dated 12-2-1973 was issued, deciding to constitute two separate wings of the Civil and Criminal Judiciary consisting of Sub-Judges and Munsifs on the civil side and District Magistrates(Judicial), Sub-Divisional Magistrates, Additional 1st Class Magistrates, and Sub-Magistrates, on the criminal side. The two new services were to be designated as Kerala Civil Judicial Service and Kerala Criminal Judicial Service Rules for the new services were to be issued separately. The G.O. further provided:

For implementing the Scheme of Separation of the Civil and Criminal wings of the Judiciary, Government are pleased to order as follows:

(i) Option will be allowed to all Civil Judicial Officers originally borne on the Magistracy, irrespective of whether or not, they have been confirmed as full members in the Kerala State Judicial Service.

(ii) Those who opt to the criminal wing and whose options are accepted by Government will be given posting in the new criminal judicial service only to the post they would have held, on the basis of, their original rank in the Magistracy and not with reference to their present position in the State Judicial Service.

(iii) All the posts of Sub-Divisional Magistrates will be released for members of the new criminal judicial service. The present incumbents in the posts of Sub-Divisional Magistrates will accordingly be posted back as Munsifs, with the

implementation of scheme.

(iv) Persons who have been appointed as District Magistrates on or before the date of implementation of the scheme will be allowed to continue as such, retaining their membership in the civil judiciary, till they are appointed to the Higher Judicial Service or retire from Service.

(v) If the number of optants to the criminal wing happens to be in excess of the number of posts available for accommodating them in the criminal judicial service the optants found in excess will be retained in the civil judiciary for eventual absorption in the criminal judiciary as and when vacancies arise, consistent with their original seniority in the criminal wing.

(vi) The options once exercised shall be final.

The officers were allowed to exercise option, within a period of two months from the date of the G.O. Ext. P2 G.O. dated 18-9-1973 was issued after the officers had exercised their options. It recorded that 15 officers had opted to the criminal judiciary. The option of one (Smt. P. Komalavally) not being unconditional, was not accepted. The options of the remaining fourteen, were accepted. In accordance with paragraph 3(iii) of Ext. PI G.O. all the posts of Sub-Divisional Magistrates were released to the members of the criminal judiciary and, in accordance with paragraph 3(v), as the number of optants exceeded the number of posts available, those in excess of the posts were to be retained in the civil judiciary for eventual absorption in the criminal Judiciary as and when vacancies arose. This meant that the excess five hands of the criminal judiciary were to continue for the time being, in the civil judiciary. This was replaced by the Rules issued separately for the civil and criminal Judiciary, and published in the Kerala Gazette dated 22nd November, 1973 By Rule 5, the Civil Judicial Service Rules constituted the service consisting of Subordinate Judge and Munsifs. Appointment to the category of Subordinate Judges was by promotion from Munsifs, and to that of Munsifs, by direct recruitment and by transfer from the feeder categories mentioned in Sub-rule 3 of Rule 6. Among the feeder categories are Additional 1st Class Magistrates, and Sub-Magistrates. Rule 18 stated that notwithstanding anything contained in the Rules the officers whose options to the Criminal Judicial Service had been accepted by the Government shall be allowed to continue in the present posts in the Kerala Civil Judicial Service till they are given posting in the Criminal Judicial Service. The Criminal Judicial Service Rules, by Rule 5, constituted a service consisting of District Magistrates, Sub-Divisional Magistrates, Additional 1st Class Magistrates and Sub-Magistrates- The appointment to each of the first three categories, was from the immediately lower category, in the order named. The appointment to the fourth category of Sub-Magistrates was by direct recruitment and by transfer as provided in Sub-rule (3) of Rule 6. Rule 18(1) stated that Sub-Judges posted as District Magistrates prior to the implementation of the scheme of separation of the two wings of the judiciary shall be allowed to continue to hold the post of District Magistrates, retaining the membership of the civil judiciary till they

vacated the posts by retirement, promotion or otherwise. Sub-rule (ii)(2) stated that those whose options to the Criminal Judicial Service had been accepted shall be allowed to continue in the present posts in the Civil judicial Service till they are given suitable posting in the Criminal judicial Service. This completes the history of the steps taken to separate the Judiciary from the Executive, and to further separate the two wings of the Judiciary into Criminal and Civil Branches.

8. The argument of counsel for the petitioner, In brief, was that as a result of the G. Os., and the statutory directions and Rules issued under Articles 234 and 237 of the Constitution from time to time, there had been an integration of the posts of District Magistrates and Sub-Divisional Magistrates with those of Sub-Judges and Munsifs, After such integration, it was contended, that to mark off all the Magisterial posts alone and constitute them into a separate category with a separate avenue of promotion, leaving the officers and the posts in the Civil Judiciary to carve out a different channel of promotion, was discriminatory, and violated Articles 14 and 16 of the Constitution. It was further argued that Ext. P1 scheme in so far as it restricted options only to Civil Judicial Officers originally borne on the Magistracy, was again arbitrary, as the benefit of the option was denied to persons like the petitioner, who were not originally borne on the Magistracy, and recruited under the Travancore-Cochin Munsif's Recruitment Rule, 1953.

9. After careful consideration, we feel that these arguments of the petitioner are well-founded and entitled to acceptance. We are unable to see why the benefit of the option was given only to Civil Judicial Officers originally borne on the Magistracy. The petitioner has stated in paragraph 7 of the petition that he was asked by letter dated 28-3-1973, to forward his option, but he replied that the question of option did not arise in his case, as he was not eligible to opt. He has further alleged that many of his juniors in the judicial service who were originally recruited in the Magisterial Service have opted to the Criminal Judicial Service to their advantage. On the terms of Ex. P1, the petitioner is right in his contention "that he was not eligible to opt, and this averment has not been specifically denied. We see no rational justification for confining the options to those originally borne on the Magistracy. As the whole scheme of separation has been geared to this irrational classification, we are of the opinion, that the same is arbitrary and illegal.

10. No less sound and basic appears to be the attack based on the disintegration of an integrated service brought about by the orders and the proceedings which we have referred to. We have high-lighted the relevant aspects of these, in the appropriate context while referring to their provisions. It is enough to briefly stress the salient aspects.

11. It is true that the High Court, at one stage recommended, and the Government accepted, in G.O. M.S. 851/59 dated 24-9-1959 that the categories of District Magistrates and Sub-Divisional Magistrates be kept outside the fold of the civil judiciary. But in the very same G. O., they expressed the view that this

was only temporary, and the idea was to induct the District Magistrates and Sub-Divisional Magistrates into the civil judiciary. The three posts of District Magistrates and eight posts of Sub-Divisional Magistrates were to taper off to eventual extinction when the then incumbents vacated them by retirement, promotion or absorption into the civil judiciary. It was for this purpose that Rules under Article 234 of the Constitution (G.O. MS. 850 dated 24-9-1959) were simultaneously issued by the Governor, to which we have already referred. These Rules recognised that District Magistrates and Sub-Divisional Magistrates were eligible to be appointed as Sub-Judges and Munsif respectively in the Civil Judicial posts. By ad hoc Rules dated 11-2-1966, meant to further the object of absorption of the excluded Magisterial Officers into the Civil Judicial posts, it was provided that the date of commencement of continuous service in the cadre of District Magistrates, shall be the date of first appointment as Sub-Judge. After this came, Kerala State Judicial Service Rules, 1966. Rule 5 constituting the service, stated that Sub-Judges shall include Sub-Judges posted as District Magistrates (Judicial), and Munsifs shall include Munsifs posted as Sub-Divisional Magistrates. Rule 20 stated that postings and transfers of the members; of the service shall be by the High Court, and investiture of powers under Sections 10, 12 and 13 of the Cr. P. C. shall be by the Government. These provisions, in our opinion implemented the view expressed in G.O. Ms. 851 dated 24-9-1959 that the District Magistrates and Sub-Divisional Magistrates kept outside the fold of the civil judiciary were to be inducted into it. In our view they effect an integration of the posts of District Magistrates and Sub-Divisional Magistrates, with those of Sub-Judges and Munsifs. In P.S. Menon Vs. State of Kerala and Others, , a Full Bench of this Court understood the 1959 Rules framed under Article 234, and the 1966 Rules, as meant to absorb the personnel occupying the posts of District Magistrates and Sub-Divisional Magistrates into the Civil Judiciary by inducting them into that service, (See paragraph 44 of the AIR Report) which we refrain from quoting, only to avoid further lengthening of this judgment). The decision was reversed by the Supreme Court on one point (regarding the counting of temporary service, under the Madras Rules for purposes of seniority), in Civil Appeals Nos. 2622 and 2630 of 1969 and 304 and 305 of 1972. The Supreme Court in its judgment referred to the ad hoc Rules framed on 11-2-1966 (Ex P 28) as meant for absorption of the Criminal side Judicial Officers of the Travancore-Cochin Branch who were kept in a separate cadre into the civil judiciary. If there was thus an integration of the posts of District Magistrates and Sub-Divisional Magistrates with those of Sub-Judges and Munsifs, and an absorption of the Magistrial posts into the Civil Judiciary-as we hold there was-the singling out of certain posts from the integrated service for a separate avenue of promotion is discriminatory.

12. In State of Mysore Vs. M.H. Krishna Murthy and Others, , the two writ petitioners before the High Court had joined the service in the Accounts" service in the Comptroller"s Office of the former Mysore State. After the abolition of the Comptroller"s Office, they were working under the Chief Engineer, P.W D as

account clerks. In 1955, a Divisional Accounts" Cadre was created by the Mysore Government under the administrative control of the Chief Engineer. Both the petitioners were absorbed in this cadre. In 1957, the two formerly separate units of the Accounts Service, namely, the P.W.D. Accounts Unit under Chief Engineer, and the Local Fund Audit Unit known also as "The State Accounts" Department", came under the common administrative control of the Comptroller of State Accounts. Thereafter, 1959 the Mysore State Accounts Service Cadre and Recruitment Rules were issued, and the combined cadre strength was fixed. After examining these Rules, the High Court held that there was a clear and complete integration brought about between the two wings. The petitioners' grievance was that while this was so, they were discriminated against in the matter of promotion merely because they had worked previously in the P.W D. Accounts Unit, which had ceased to exist. The High Court held this grievance was justified. It found a striking disparity in the promotional opportunities between the officers of the two services in the same category, and that the impugned notifications fixing up the cadre strength reduced the number of promotion posts available to the Public Works Unit to a very low figure compared with the promotional opportunities open to the officers in the other wing. It, therefore, struck down the impugned notifications, as violative of Articles 14 and 16, of the Constitution. This was affirmed by the Supreme Court. In so doing, the Court observed:

7. The question which remains for consideration by us is the one relating to the validity of a division into two classes of members of the same service, belonging to the same cadre, for purposes of a difference to be made in their promotional chances. Learned Counsel for the State has sought to justify this difference in promotional chances by a reference to differences in the historical backgrounds and to the practice of making the distinction in promotional chances. The Mysore High Court had very rightly observed that neither a fortuitous artificial division in the past nor the unconstitutional practice of making unjustifiable discrimination in promotional chances of Government servants belonging to what was really a single category, without any reference either to merit or seniority, or educational qualifications, could justify the differences in promotional chances. We think that it had rightly declared the purported amendments in the rules of 1959, which sought to disintegrate a service which had been integrated, to be ultra vires. Such amendments made for the purpose of justifying the illegal promotions made, in the teeth of the protection conferred by Articles 14 and 16(1) of the Constitution of India upon Indian citizens in Government service, could not be upheld.

The Court referred to the *The State of Mysore Vs. Padmanabhacharya etc.*, , referred to by the Mysore High Court for holding that the power of making rules under Article 302 relating to recruitment and conditions of service, could not be used to validate unconstitutional discrimination in promotional chances of Government servants who belong to the same cadre. The decisions in *Ramlal Madhwa v. State of Haryana* 1972-II L.L.J 209 : AIR 1972 S.C. 1962, and *S.G. Jaisinghani Vs. Union of India (UOI) and Others*, , were considered and

distinguished as having been decided on the special facts. The Court concluded as follows:

11. Other cases mentioned by the Mysore High Court, i.e., *State of Punjab Vs. Joginder Singh*, , and *K.M. Bakshi v. Union of India* (1965) Supp. 2 S.C.R. 169. also show that inequality of opportunity of promotion, though not unconstitutional per se, must be justified on the strength of rational criteria correlated to the object for which the difference is made. In the case of Government servants, the object of such a difference must be presumed to be a selection of the most competent from amongst those possessing qualifications and backgrounds entitling them to be considered as members of one class. In some cases, quotas may have to be fixed between what are different classes or sources for promotion on grounds of public policy. If, on the facts of a particular case, the classes to be considered are really different, inequality of opportunity in promotional chances may be justifiable. On the contrary, if the facts of a particular case disclose no such rational distinction between members of what is found to be really a single class no class distinctions can be made in selecting the best. Articles 14 and 16(1) of the Constitution must be held to be violated when members of one class are not even considered for promotion. The case before us falls, in our opinion, in the latter type of cases where the difference in promotional opportunities of those who were wrongly divided into two classes for this purpose only could not be justified on any rational grounds.

13. In *Mervyn Coutindo and Others Vs. Collector of Customs, Bombay and Others*, , one of the questions considered was whether having integrated the transfer promotees and direct recruits in the cadre of the appraisers, there was any justification for applying the rotational system for further promotion to the next cadre of principal appraisers, from these two classes of appraisers. In holding that there was none, the Court observed:

The source of recruitment of principal appraisers is one, namely, from the grade of appraisers. There is, therefore, no question of any quota being reserved from two sources in their cases. The rotational system cannot, therefore, apply when there is only one source of recruitment and not two sources of recruitment. In a case, therefore, where there is only one source of recruitment, the normal rule will apply, namely, that a person promoted to a higher grade gets his seniority in that grade according to the date of promotion subject always to his being found fit and being confirmed in the higher grade after the period of probation is over. In such a case it is continuous appointment in the higher grade which determines seniority for the source of recruitment is one. There is no question in such a case of reflecting in the higher grade the seniority of the grade from which promotion is made to the higher grade. In so far, therefore, as the respondent is doing what it calls restoration of seniority of direct recruits in appraisers' grade when they are promoted to the principal appraisers' grade, it is clearly denying equality of opportunity to appraisers which is the only source of recruitment to the principal appraisers' grade. There is only one source from which the principal appraisers

are drawn, namely, appraisers, the promotion being by selection and five years' experience as appraiser is the minimum qualification. Subject to the above all appraisers selected for the post of principal appraisers must be treated equally. That means they will rank in seniority from the date of their continuous acting in the principal appraisers' grade subject of course to the right of Government to revert any of them who have not been found fit during the period of probation. But if they are found fit after the period of probation they rank in seniority from the date they have acted continuously as principal appraisers whether they are promotees or direct recruits. The present method by which the respondent puts a direct recruit from the grade of appraiser, though he is promoted later, above a promotee who is promoted to the grade of principal appraiser on an earlier date clearly denies equality of opportunity where the grade of principal appraiser has only one source of recruitment, namely, from the grade of appraiser. In such a case the seniority in the grade of principal appraisers must be determined according to the date of continuous appointment in that grade irrespective of whether the person promoted to that grade from the appraisers' grade is a direct recruit or a promotee. This will as we have already said be subject to the Government's right to revert any one promoted as a principal appraiser if he is not found fit for the post during the period of probation.

The learned Advocate - General contended that the petitioner who is a Sub-Judge had only a right to be considered for promotion to the next higher grade which was that of a District Judge, and that this right had in no way been affected, either by Ext. P1 and P2 G.Os. or the Rules governing the two separate wings of the judiciary which followed in their wake. It was, therefore, said that the petitioner had no grievance. We are unable to agree. It is well-known that the accustomed mode of promotion for a Sub-Judge to the category of District Judge is after serving for a time as District Magistrate. Both from the point of view of functional responsibilities and of the higher emoluments attached - however slight they might be, we think that the District Magistrate's post was a promotion post vis a vis that of the Sub-Judge. The petitioner has alleged that this was always understood to be so, and in proof thereof, has produced with his reply affidavit a sample copy of Ext. P3 order of the High Court dated 8-7-1971, which shows that in the case of four Sub-Judges, they were all "promoted" as District Magistrates. The result of the impugned G.Os. and Rules is to deprive the petitioner of his opportunity for "promotion" as District Magistrate, whatever that may mean to him ; and we have found that there is no rational justification to do so. The petitioner's grievance is, therefore, legitimate.

14. We may refer to one other contention advanced by counsel for the petitioner. It was said that the power under Article 237 of the Constitution was a power of conditional legislation and that, having been properly exercised once, it cannot be exercised again. Therefore, it was said, that the Criminal Judicial Service Rules, 1973 (annexure IV to the additional counter-affidavit of the 1st respondent) which purports to have been made under Articles 234 and 237 of the Constitution of India, and in supersession of the existing Rules and

Regulations on the subjects was invalid and ineffective. We are unable to accept this argument. Assuming that the power under Article 237 is one of conditional legislation, Article 367 of the Constitution makes the provisions of the General Clauses Act applicable to the interpretation of the provisions of the Constitution, unless the context otherwise provided. That would attract Section 21 of the General Clauses Act. We see nothing in the context why the power of issuing a Notification or Rule under Article 237, is not capable of exercise as often as occasion requires or arises.

15. It was then said that to recognise the existence of a power to do so in the Governor and to relate the same to the Criminal Judicial Service Rules, would be to enlarge the definition of the term "Judicial Service" given in Article 236(b) of the Constitution. We cannot agree. Article 237 gives the Governor the power to apply the provisions of Chapter VI of the Constitution and the Rules made thereunder, to any, class or classes of Magistrates in the State, in the same way in which they apply to persons appointed to the judicial service of the State. There is no enlargement of the definition of "Judicial Service" in Article 236(b) of the Constitution, nor any clash with the said provision,

16. In the result, we hold that Exts. P1 and P2 G Os. by which the two separate wings more constituted in the Judiciary of this State as Civil and Criminal, are invalid, as; (1) the G.Os. restrict the exercise of option to get into criminal judiciary only to officers borne on the Magistracy ; and (2) as the separation into two wings and the carving out of separate promotional avenues for the Magisterial section of the Judiciary, which had been integrated with, or absorbed into, the Civil Judicial posts, is discriminatory and irrational. As the very basis of the scheme of separation and promotion enjoined by the G.Os. and the statutory Rules is illegal, the G.Os. and the Rules have to be struck down in their entirety, and we do so. This writ petition is allowed and Exts. P1 and P2 G.Os. and the Statutory Rules (annexures III and IV in the additional counter-affidavit of the State) are quashed. We make no order as to costs.

17. We make it clear that we have dealt with the validity of the G.Os. and the Rules only in the light of the aspects presented by the petitioner and not on any other aspects which might possibly arise for consideration in other appropriate cases. We may state that the 3rd respondent in this writ petition, a Sub-Judge and the 4th respondent, an Additional 1st Class Magistrate were impleaded in their representative capacity as representing these categories.