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**(1982) 12 GUJ CK 0012**  
**In the Gujarat High Court**

N.J. Mankad

APPELLANT

Vs

State and Others

RESPONDENT

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**Date of Decision :** 08-12-1982

**Acts Referred:**

Constitution of India, 1950 — Article 233, 233(1), 235, 235  
States Reorganisation Act, 1956 — Section 55

**Citation :** (1983) 2 GLR 897

**Hon'ble Judges :** B.K. Mehta, J

**Bench :** Single Bench

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**Judgement**

B.K. Mehta, J.—A point of considerable importance as to the power of the State Government to differ from the recommendation made by the High Court in the matter of grant of notional promotion and payment of monetary benefits in pursuance thereof to a City Civil Judge in exercise of its power under Act. 235 of the Constitution of India arises in this petition. The question arises in the following circumstances:

The Petitioner began his judicial career as an Assistant Judge & Additional Sessions Judge in the former State of Saurashtra on November 5, 1948. He was promoted as District Judge and had acted also as a Remembrancer of legal affairs and Secretary in the Law Department in the times of the erstwhile State of Saurashtra in July, 1951. In 1954, the Petitioner requested for his repatriation to the Judicial Service but the then Government of the State of Saurashtra could not spare his services though he was assured that his interest of judicial service will not be jeopardized by the petitioner's continuance in the Legal Department. The Petitioner was thereafter transferred from Legal Department and posted as District & Sessions Judge at Bhavnagar in June, 1956. There-after he was transferred to different districts in the bilingual State of Bombay in Kutch and Panchmahals districts in 1957 and 1959 respectively. On formation of the State of Gujarat in May, 1961, the Petitioner was again transferred and posted as District & Sessions Judge Bhavnagar in 1962. Unfortunately, however, on the establishment of the City Civil Courts at Ahmedabad in November, 1961, he was

not promoted as City Civil Judge having regard to the seniority assigned to him in the provisional seniority list of District Judges as on the date of the formation of the bigger bilingual State, that is, 1-11-1956. However, on June 12, 1965, he was promoted as City Civil Judge. He, however, was not elevated and appointed as Principal Judge, City Civil Courts, till his superannuation on January 24, 1969. It should be recalled that the Government of the erstwhile bilingual State of Bombay, on the recommendation of the High Court of Bombay, while fixing the seniority of District Judges coming from different merging States, had deducted five years of service of judicial officers coming from Saurashtra State including the Petitioner as decided by the Government resolution of October 25, 1956. The said resolution provided for equation of the posts of the employees of the merging States including the old State of Saurashtra. It, inter alia, directed to equate the posts of Saurashtra employees after deducting five years from their total length of service. Since the decision contained in the Government resolution of October 25, 1957 was without the prior approval of the Central Government, it violated the provisions contained in Section 155 of the States Re-organisation Act, 1956. The Union Government by its letter of February 5, 1960 directed the Government of Bombay that the absorption of Saurashtra employees should be on cadre to cadre basis and that inter se seniority of those employees should be determined on the basis of the total length of their continuous officiation in the equated cadre and the Govt. of Bombay was advised that it should take immediate steps accordingly to revise the equation and the seniority. A full Bench of this Court in *A. J. Patel and Ors. v. The State of Gujarat and Ors.* AIR 1965 Guj 23 also ruled accordingly. The Government of Maharashtra, therefore, by its resolution of 25th November 1971 ultimately revised the gradation list of the judicial officers of the merging States as on 1st November 1956 where the Petitioner was shown at Sr. No. 20 and placed him above S/Shri N. G. Shelat, A.S. Sarela, T. U. Mehta, J. M. Sheth and V.R. Shah, who were shown at Sr. No. 32 to 36 respectively in the said list. The Maharashtra Government, therefore, resolved by its resolution of October 18, 1975, in exercise of its power under Rule 4(1) of the Allocated Government Servants (Absorption, Seniority, Pay & Allowances) Rules, 1957 and absorbed the allocated judicial officers from the former States of Bombay, M. P., Hyderabad, and Saurashtra-Kutch as specified in the statement appended to the said resolution in the cadre of District Judges with retrospective effect from 1-11-56. The said resolution further referred to the orders issued under the Government of Bombay resolution in Law and Judicial Department dated September 25, 1971 regarding seniority of officers absorbed in the District Judges' cadre. In terms of this resolution the act of absorption and finalisation of the gradation list of the allocated judicial officers came to be completed somewhere in October/ December, 1975. Meanwhile, on the establishment of the City Civil Courts in November, 1961, S/Shri N. G. Shelat, A.S. Sarela, J. M. Sheth, V.R. Shah and V. V. Mehta were appointed as City Civil Judges in 1961 while Shri T. U. Mehta was appointed somewhere in September 1963. The Petitioner expected that the authorities would do him justice on the revision of the gradation list pursuant to the Maharashtra

Government resolutions of 25th November, 1971 and October 18, 1975 and finalisation and absorption of District Judges coming from Saurashtra area somewhere in October/ December, 1975 since the appointments made by promotion of the aforesaid judicial officers as City Civil Judges in November, 1961 were for all intents and purposes provisional in view of the circulars issued by the Government of the erstwhile State of Bombay of 10th March, 1960 as well as the Government of Gujarat in 1963 and also having regard to the Scheme of States Re-organisation Act that all the actions in the matter of the services were to be treated as provisional and stop-gap arrangement pending finalisation of the gradation list required to be prepared by the Government of successor-State showing the position of the allocated employees as on 1st November, 1956.

2. The hope of the Petitioner was belied and he was, therefore, compelled to submit a representation on 29th January, 1979 to this High Court on its Administrative Side to consider his case for notional promotion and to grant him all monetary benefits particularly in light of the decision of this Court (Coram: B. J. Diwan, C. J. as he then was) in Special Civil Application No. 912 of 1974 decided on 13th June, 1978 filed by Shri T. U. Mehta, whose claim was upheld that pursuant to his revised position in the gradation list where he was placed above M/s. J. M. Sheth and V.R. Shah and just below M/s. N. G. Shelat and A.S. Sarela, he should be granted notional promotion in the cadre of City Civil Judges with all back benefits as a result thereof. The Petitioner learnt that this Court on its Administrative Side has resolved that had the gradation list of District Judges at the time of establishment of City Civil Courts at Ahmedabad on 4-11-61 been revised, as subsequently revised by the Resolution dated 25th September, 1971, in so far as it related to the officers allocated to the State of Gujarat with effect from 1st May 1960, the Petitioner would have been appointed as City Civil Judge on 4th November, 1961, alongwith other District Judges so appointed, and that he would not have been appointed as Principal Judge of the City Civil Court at the relevant time. The Petitioner also learnt that the High Court has by letter of 20th December, 1979 informed the Petitioner of the aforesaid decision and that the Government was moved to take necessary action in the matter to give effect to the said decision of the High Court. The Petitioner expected that the State Government will accept this recommendation of the High Court on its Administrative Side but to his surprise he learnt from the letter of the Registrar of this Court dated 29th June, 1961 that the Government has not accepted the request made by the Petitioner in his representation of 2nd January, 1979 with the result that the Petitioner was compelled to move this Court for appropriate writs, orders and directions to quash and set aside the order of the State Government refusing, to give retrospective promotion to the Petitioner as a City Civil Judge and/or as Principal Judge of the City Civil Court, Ahmedabad and enjoining the respondent-State to give effect to the decision of the High Court dated 20th December, 1979 by giving notional promotion to the Petitioner in the cadre of City Civil Judges with effect from 4-11-61 and to pay difference between the salary which he would have received if he had been so appointed and the

actual salary which he received then as a District Judge, and to grant all consequential benefits arising as a result of notional promotion in the matter of fixation of salary, pension, gratuity etc. with interest on the amounts so directed to be paid at the rate of 10% from the date of the order refusing to grant the benefits till payment.

3. Pursuant to the notice issued by this Court (Coram: S.L. Talati, J. on December 23, 1981, appearance was filed on behalf of the State Government, though no reply affidavit was filed opposing the admission of the petition. The petition was, therefore, admitted and Rule nisi was issued by this Court (Coram : S.L. Talati, J.) by its order of January 22, 1982.

4. Till July 12, 1982, when the petition reached hearing before me, no reply affidavit on behalf of the State Government had been filed. The matter was heard on 13th and 14th July 1982 and it was suggested to the learned Assistant Government Pleader to advise the Government to accept the recommendation made by the Full Court on its Administrative Side for granting notional promotion to the petitioner and all the monetary benefits as a result of that promotion. The learned Assistant Government Pleader, having regard to the legal position, agreed to advise the Government accordingly. Unfortunately, however, the advice did not appear to have found favour with the Government and, therefore, ultimately the matter reached for final hearing on 16th August, 1982. The Government was permitted to file affidavit in reply to the petition and accordingly the reply affidavit of one Shri K.M. Cherian, who happens to be Under Secretary to the Government of Gujarat in the Legal Department dated August 10, 1982, has been allowed to be placed on the record. The Petitioner has filed rejoinder affidavit on December 6, 1982.

5. The petition has been resisted on behalf of the State Government, inter alia, on the ground that the appointment by promotion to the post of City Civil Judge from amongst District Judges was on the basis of merit-cum-seniority and, therefore, the petitioner could not have claimed this promotion as a matter of right. The fact that Shri T. U. Mehta, who was junior to the petitioner, was granted notional promotion with effect from 4-11-1961 as recommended by the High Court of Gujarat on its Administrative Side, pursuant to the decision of the Court on its judicial side in Special Civil Application No. 912 of 1974 filed by Shri T. U. Mehta, which was admittedly earlier in point of time to the recommendation made by the High Court on its Administrative Side in favour of the petitioner on December 20, establishing that the petitioner was, in effect and substance, superseded by Shri T. U. Mehta for purposes of notional promotion and, therefore, the State Government was perfectly justified in not accepting the recommendation of the High Court. In any case, the petitioner is not entitled to any monetary benefits in light of the directions contained in the Government Circular issued in Political and Services Department of the Government of Bombay dated 10th March 1968, which, inter alia, provided that no arrears of pay should be paid for the period prior to the date of actual promotion though he

might be notionally promoted in light of the final gradation list.

6. Broadly stated, three questions arise for my decision. In the first place, whether the decision of the High Court of Gujarat on its Administrative Side dated December 20, 1979 that the Petitioner would have been appointed as City Civil Judge, Ahmedabad on 4th November 1961 along with other District Judges so appointed in light of the gradation of the District Judges as on 4-11-61 as revised by the Government of Maharashtra vide its resolution of September 25, 1975, is one in exercise of the power of control vested in the High Court under Article 235 of the Constitution. Secondly, whether the State Government is entitled to defer and refuse to accept the recommendation made by the High Court according to the aforesaid decision, and, thirdly, whether the petitioner is entitled to the arrears of the difference in the salary and allowances which he would have received, if he had been so appointed as City Civil Judge as recommended by the High Court, and the salary actually drawn by him as District Judge during the period commencing from 4-11-1961 till his actual appointment on June 12, 1965.

7. The learned Advocate for the petitioner urged that the question of promotion is within the power of control of the High Court over the Judicial Services under Article 235 of the Constitution and, therefore, if any decision is made about the actual and/or notional promotion of a judicial officer under the control and supervision of the High Court, and recommendations made in terms of the decision to the State Government, the entire matter is *ex facie* within the power of control under Article 235 and, therefore, the State Government is not entitled to defer or refuse to implement the decision and if at all it is, it can do so only at the pains of committing contempt of the Court. He further urged that the correspondence on the file of the Registrar of this Court, which has been disclosed pursuant to the oral directions of this Court, that Judges of the High Court on its Administrative Side clearly opined that the case of the Petitioner was identical with that of Shri T. N. Mehta with the only difference that the claim of Shri T. U. Mehta was judicially recognised and, therefore, there is no justification for making any distinction between the two cases and, therefore, the High Court recommended that the State Government should pass immediate orders sanctioning the monetary benefits to the petitioner. He therefore submitted that the State Government could not have, in the settled constitutional position, taken the stand as it did in its reply affidavit. The Petitioner is, therefore, entitled not only to the arrears of the difference in the salary actually drawn and notionally entitled to but also to the interest at the rate of 10% since this amount has been unlawfully withheld in spite of the clear recommendations of the High Court on its Administrative Side.

8. On the other hand, Mr. R.M. Vin, learned Government Pleader who has replaced the Assistant Government Pleader Mr. Trivedi since he recommended otherwise to the Government, sought to resist the claim of the petitioner on two grounds. In his submission, the present case is not a case of promotion as the

petitioner had retired and the recommendations of the High Court which is ex facie hypothetical would not be binding on the Government since it cannot be said to be a recommendation made in exercise of the power of control under Article 235 of the Constitution. He also urged that in any view of the matter, the petitioner was not entitled to payment of any arrears of salary being the difference in the salary actually drawn and the salary which would have been paid to him if he had been so promoted in light of the circular of the Government of the erstwhile State of Bombay of March 10, 1960 and reiterated by the State Government Resolution dated August 28, 1969. The learned Government pleader attempted to persuade me that the decision of this Court (Coram; B. T. Divan, C.J.) in Special Civil Application No. 912 of 1974 filed by Shri T. U. Mehta that the directions contained in these two Government resolutions are not applicable since the pertinent question was not the erroneous fixation of seniority but wrong application of the principle of seniority is not tenable having regard to the directions in the said resolutions which is in the widest terms. In other words, he submitted that the view of the learned Single Judge of this Court that when the problem is of wrong application of the seniority the circular would not apply is not well founded and, therefore, requires to be reconsidered.

9. It is in light of these rival contentions that I have to decide whether the petitioner is entitled to all or any of the reliefs.

Re : Questions 1 and 2:

10. Under Articles 233(1) of the Constitution, appointments of persons to be, and the posting and promotion of, District Judges in any State is, to be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. Whether Article 233(1) invests the power of further promotion of District judges in the Governor of the State came up for consideration before the Supreme Court in *State of Assam and Another Vs. Kuseswar Saikia and Others*, . In that case, three accused persons who were convicted by the District & Sessions Judge, Darrang at Tazpur, challenged their conviction on the ground, inter alia that the incumbent of that office was not entitled to the post of District & Sessions Judge by moving the High Court for a writ of qua-warranto. The High Court held that the promotion of the incumbent of the said office by the Governor as Additional District Judge purporting to act under Article 233 was void because he could only be promoted by the High Court acting under Article 235. Consequently, further appointment of the said incumbent as District Judge by the Governor was also declared by the High Court to be void. The High Court, however, refused to interfere with the conviction because it was of the opinion that the simultaneous promotion of the said incumbent as Additional Sessions Judge was valid and the Governor was competent to make the appointment and, therefore, his further appointment as Sessions judge was also valid. On appeal by the State of Assam to the Supreme Court, the appeal was allowed by the Supreme Court. Hidayatullah C.J., (as he then was) speaking for the Court considered Article 233-A of the Constitution

and held as under:

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The language seems to have given trouble to the High Court. The High Court holds:

(1) "appointment to be" a District Judge is to be made by the Governor in consultation with the High Court vide Article 233; and

(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.

The High Court gives the example of selection grade posts in the cadre of District Judges which according to it is a case of promotion of a District Judge. 5. The reading of the article by the High Court is, with respect, contrary to the grammar and punctuation of the article. The learned Chief Justice seems to think that the expression "promotion of governs "District Judges" ignoring the comma that follows the word "of. The article, if suitably expanded, reads as under :

Appointments of persons to be, and the posting and of (persons to be). District Judges etc....

It means that appointment as well as promotion of persons to be District Judges is a matter for the Governor in consultation with the High Court and the expression "District Judge" includes an Additional District Judge and an Additional Sessions Judge, it must be remembered that District Judges, may be directly appointed or may be promoted from the subordinate ranks of the judiciary. The article is intended to take care of both. It concerns initial appointment and initial promotion of persons to be either District Judges or any of the categories included in it. Further promotion of District Judges is a matter of control of the High Court. What is said of District Judges here applies equally to Additional District Judges and Additional Sessions Judges Therefore when the Governor appointed Rajkhowa an Additional District Judge, it could either be an "appointment" or a promotion under Article 233. If it was an appointment it was clearly a matter under Article 233. If the notification be treated as "promotion" of Rajkhowa from the junior service to the senior service it was "promotion" of a person to be District Judge which expression, as shown above, includes an Additional District Judge. In our opinion it was the latter. Thus there is no doubt that the appointment of Rajkhowa as Additional District Judge by the Governor was a promotion and was made under Article 233. It could not be made under 235 which deals with posts subordinate to a District Judge including an Additional District Judge and an Additional Sessions Judge. The High Court was in error in holding that the appointment of Rajkhowa to the position of an Additional District Judge was invalid because the order was made by the Governor instead of the High Court. The appointment or promotion was perfectly valid and according to the Constitution.

11. The above decision of the Supreme Court has been quoted with approval by the Supreme Court in High Court of The High Court of Punjab and Haryana and Others Vs. The State of Haryana and Others, . The Court in. that case was concerned with the validity of the confirmation under Rule 10 of the Punjab Superior Judicial Service Rules conferring power of Governor to confirm District Judge. In that context, the Supreme Court ruled that the initial appointment of persons to be District Judges as well as the initial promotion of persons to be District Judges is with the Governor, but once they are appointed and promoted to be District Judges, the entire control is thereafter vested in the High Court, and the confirmation of persons appointed to be or promoted to be District Judges is within the control of High Court. Ray, C.J., as he then was, speaking for the Court, quoted with approval the earlier decision of the Supreme Court in Kaseswar's case (supra) in the following terms:

42. In Kuseswar Saikia's case (supra) this Court said that further pro State of Assam and Another Vs. Kuseswar Saikia and Others, motion of District Judges is a matter of control of the High Court. Therefore, the initial appointment of persons to be District Judges as well as the initial promotion of persons to be District Judges is with the Governor. Once they are appointed and promoted to be District Judges the entire control is thereafter vested in the High Court. As to what further promotion of District Judges can be, is illustrated by their appointment to Selection Grade posts.

12. Inview of the above settled legal position, it cannot be gainsaid nor the question is capable of being elaborated further that further promotion of a District Judge is within the power of control under Article 235 of the Constitution. If, therefore, the High Court has made any recommendation in respect of further promotion of a District Judge, since the appointing authority under the Recruitment Rules is the Governor, the said recommendation is binding to the Government which has no power thereafter to defer from the recommendation or to refuse to implement the same. It is no doubt true that under the Gujarat Judicial Service Recruitment Rules, 1961, as were in force at the relevant time of the establishment of the City Civil Court at Ahmedabad, or under the Gujarat Judicial Service Recruitment (Amendment) Rules, 1979 as were in force on the date of the recommendation by the High Court in December, 1979, the appointment to the post of a Judge, City Civil Court, Ahmedabad, can be made by the Governor from amongst the District Judges in consultation with the High Court as was the position under 1961 Rules, or from amongst the District Judges, the Chief Judge, Small Cause Court, Ahmedabad and the Chief Metropolitan Magistrate, Ahmedabad, or from amongst the District Judges by transfer under the 1979 Amendment Rules. An attempt was made on behalf of the Government to urge that since the relevant Recruitment Rules invest this power of appointment in the Governor, this is a matter of initial appointment which would be governed under Article 233 of the Constitution. I am afraid this contention is not well founded for the obvious reason that the Recruitment Rules could not have gone against the scheme of the Constitution contained in Articles

233 to 236. The Rules are to be read subject to the provisions contained in Article 233 read with Article 235 as interpreted by the Supreme Court. It is only the initial appointment of persons to be District Judges as well as the initial posting and promotion of persons to be District Judges which could be with the Governor. The power of further promotion of a District Judge is within the control, jurisdiction and authority of the High Court under Article 235 as clearly laid down by the Supreme Court in Kuseswar's case (supra), and approved in High Court of Punjab and Haryana's case (supra).

13. The learned Government Pleader, therefore, urged that having regard to Article 233 read with Article 236 of the Constitution, the power of initial appointment as well as the power of initial promotion of persons to be District Judges, which expression includes a Judge of the City Civil Court is with the Governor, and it will therefore not fall within the power of the High Court under Article 235. He further urged that having regard to the definition of term "District Judge" which includes City Civil Judge, the Recruitment Rules have invested this power in the Governor so as to make it consistent with Article 233. Assuming that the learned Government Pleader is right in his submission, Article 233(1) enjoins that the Governor shall appoint suitable persons from the cadre of District Judges in consultation with the High Court. What is the scope and width of this obligation of consultation under Article 233 has been considered by the Supreme Court in Chandra Mohan v. State of U.P. AIR 1966 SC 1987 in the context of U.P. Higher Judicial Service Rules for recruitment of District Judges. The Supreme Court ruled that the constitutional mandate of Article 233 is clear and the exercise of the power of appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of District Judge in consultation with the High Court. It is held that the object of consultation is apparent and the High Court is expected to know better than the Governor in regard to the suitability or otherwise of a person belonging either to the "judicial service" or to the Bar to be appointed as a District Judge. It is further held that this mandate can be disobeyed by the Governor in two ways; directly, by not consulting the High Court at all, and indirectly by consulting the High Court and also other persons. Such consultation is not empty formality and since the impugned Rules rendered the consultation in empty formality, they would be held to be void. The Supreme Court, speaking through Subba Rao C. J. (as he then was) extracted Articles 233 to 237 and summarised the gist of the provisions in the following terms:

15 ...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. There are two sources of recruitment, namely, (i) service of the Union or of the State, and (ii) members of the Bar. The said Judges from the first source are appointed in consultation with the High Court and those from the second source are appointed on the recommendation of the High Court. But in the case of appointments of persons to the judicial service other than as district Judges they will be made by the Governor of the State in accordance with the rules framed by him in

consultation with the High Court and the Punjab Service Commission. But the High Court has control over all the district Courts and Courts subordinate thereto subject to certain prescribed limitations.

14. In *State of Assam Vs. Ranga Mahammad and Others*, , the Supreme Court ruled that the consultation is mandatory and not directory, and if what the High Court has to say is received with ill-grace or rejected out of hand, consultation loses all its meaning and becomes mockery and hence the opinion of the High Court is entitled to the highest regard.

15. It, therefore, follows that the learned Government Pleader must satisfy this Court that even on his interpretation in the present case, the Governor had really and affectively consulted the High Court and that the Governor rejected the recommendation of the High Court after proper deliberations and mature consideration of the recommendation of the High Court. This principle has been reiterated in *Hari Datt Kainthla and Another Vs. State of Himachal Pradesh and Others*, . The Court was concerned with the question of promotion to the post of District Judge from amongst the posts belonging to subordinate judicial Service and the validity of promotion granted to some of the Judicial Officers on the basis of seniority to the post of District/Additional District and Sessions Judges on the basis of the principle of seniority-cum-merit. In that context, the Supreme Court, speaking through D. A. Desai, J, expounded the scope of consultation under Article 233. The relevant observations read as under:

12. Article 233 confers power on the Governor of the State to appoint persons either by direct recruitment or by promotion from amongst those in the judicial service as District judges but this power is hedged in with the condition that it can be exercised by the Governor in consultation with the High Court. In order to make this consultation meaningful and purposive the Governor has to consult High Court in respect of appointment of each person as District Judge which includes an Additional District Judge and the opinion expressed by the High Court must be given full weight. Article 235 invests control over subordinate courts including the officers manning subordinate courts as well as the ministerial staff attached to such courts in the High Court. Therefore, when promotion is to be given to the post of District Judge from amongst those belonging to subordinate judicial service, the High court unquestionably will be competent to decide whether a person is fit for promotion and consistent with its decision to recommend or not to recommend such person. The Governor who would be acting on the advice of the Minister would hardly be in a position to have intimate knowledge about the quality and qualification of such person for promotion. Similarly when a person is to be directly recruited as District Judge from the Bar the reasons for attaching full weight to the opinion of the High Court for its recommendation in case of subordinate judicial service, would *mutatis mutandis* apply because the performance of a member of the Bar is better known to the High Court than the Minister or the Governor....

16. In *Hari Dall's* case (*supra*), the Supreme Court re-affirmed its earlier view in

Chandra Mohan's case (supra) that the High Court is the body which is intimately familiar with the efficiency and quality of officers who are fit to be promoted as District Judges, and the High Court alone knows their merits as also demerits. In Hari Datt's case the earlier decision of the Supreme Court in A. Panduranga Rao Vs. State of Andhra Pradesh and Others, was referred with approval that there are two sources of recruitment to the post of District Judge viz., judicial service in subordinate rank and members of the Bar, and that in either case the consultation would assume the form of recommendation made by the High Court. D. A. Desai, J, in Hari Datt's case thereafter observed as under:

14. It is thus incontrovertible that appointment to the post of DSJ/ADSJ in Himachal Pradesh will have to be made in accordance with the provisions contained in Article 233. If any rules are enacted under Article 309 for regulating recruitment and conditions of service of DSJ/ADSJ, the rules will have to be in conformity with Article 233 and if they violate the constitutional mandate of Article 233 the rules will be held ultra vires as succinctly laid down in Chandra Mohan's case (AIR 1966 SC 1987). To be precise so as to leave no ambiguity, in that case Rule 13 of the U.P. Higher Judicial Service Rules provided for procedure for selection by promotion to the post of District Judge from the subordinate judicial service and amongst others, the procedure provided for selection to be made by a Committee consisting of two Judges of the High Court and the judicial Secretary to Government. This rule was held to be ultra vires as being violative of Article 233 inasmuch as the High Court could be said to have abdicated its constitutional function of making recommendation to an outside authority not known to Constitution.

17. I do not think, therefore, that the learned Government Pleader was, in any case, justified in urging that this will not be within the power of the High Court under Article 235 or in any view of the matter the learned Government Pleader was not right since it was only the High Court which could make the recommendation as to whether a particular judicial officer is competent and fit to be promoted to the post of City Civil Judge, and if the Government has rejected this recommendation without mature deliberations and consideration, the decision is clearly violative of Article 235 or 233 of the Constitution, as the case may be.

18. In the present case, the facts are eloquent. Pursuant to the Maharashtra Government resolution of November 25, 1977 deciding to revise the gradation list and pursuant to further decision of the said Government of October 18, 1975 absorbing all the allocated judicial officers, inter alia, from Saurashtra State, with retrospective effect from November 1, 1956, in the cadre of District Judges, the gradation list was required to be revised and was in fact revised which placed the Petitioner just below S/Shri N. G. Shelat, A.S. Sarela and above S/Shri T. U. Mehta, J. M. Sheth and V.R. Shah. Since the State Government did not do justice to the Petitioner by notionally promoting him in the cadre of City Civil Judges even after the decision in the case of Mr. T. U. Mehta in Special Civil Application

No. 912 of 1974 by this Court, the Petitioner was required to make a representation to this Court on 29th January 1979. In order to find out as to what steps this Court had taken on the said representation. I have directed the Registrar of this Court to produce the relevant files to show as to what directions this Court had given on its Administrative Side in the matter of the representation of the petitioner. In Hari Datt's case (supra), the Supreme Court has indicated that when the Government's action is challenged as violative of Article 235 or 233 by a writ petition, what should be the appropriate course for the High Court on its Administrative Side to adopt in such circumstances, D. A. Desai, J., speaking for the Court, indicated the course in the following terms:

26. Before we conclude it must be pointed out that where the Government acts on the recommendation of the High Court and the action of the Government is challenged by way of a writ petition, in order to facilitate appreciation of issues raised, the administrative side of the High Court, if joined as a party, must appear and place before the Court the entire record for a fair and judicial adjudication of the issues on the judicial side of the High Court....

19. Accordingly, the entire file was placed before this Court by the Registrar and it appears from the perusal of the file that on this representation of the petitioner, this Court had appointed a Sub-Committee of three learned Judges comprising of M. P. Thakkar, J. (as he then was), A. M. Ahmadi and M. K. Shah, JJ, to consider and report about the representation of the petitioner. The Committee had submitted its unanimous report by November 27, 1979. The Committee posed, inter alia the question whether the petitioner would have been appointed, to the cadre of City Civil Judges on November 4, 1961 having regard to his place in the seniority list in the cadre of District Judges as modified retrospectively and having regard to the criteria adopted at the material time. On the detailed consideration of the question referred above and the modified gradation list of District Judges as on November 4, 1961, the Committee observed as under:

...We now come to the case of the official at serial No. 5 Shri N. J. Mankad whose representation we are considering. We have examined the confidential reports of official at serial No. 2 Shri V.V. Mehta and the confidential report of Shri N. J. Mankad whose case is under consideration. We find that there are no adverse remarks in the confidential reports of either of them. With regard to the assessment of their work both were rated as "average" in the assessment for the last two years immediately preceding the material date, namely, November 4, 1961. In view of this state of record we are of the opinion that since Shri V.V. Mehta was appointed to the cadre of City Civil Court Judges, Shri N. J. Mankad would also have been appointed on parity of reasoning as both of them were given similar grading at the material time. We are, therefore, of the opinion that Shri Mankad would have been appointed to the cadre of City Civil Judges when four Judges from the cadre of District Judges were appointed.

The Committee, however, was of the opinion that the petitioner could not have

been appointed to the post of Principal Judge when the vacancy arose having regard to his position in the seniority list and having regard to the criteria applied at the material time. Now this recommendation of the Committee of the three learned Judges of this Court was approved and accepted by the Chamber Meeting unanimously and the following decision was taken as communicated to the petitioner vide letter dtd. 20-12-79:

1. Had the gradation of District Judges, at the time of establishment of the City Civil and Sessions Court, Ahmedabad. on 4-11-1961, been as subsequently revised under Government of Maharashtra Resolution, Law and Judiciary Department. No. DAJ-5370-1969-H-1, dated September 25, 1971, in so far it relates to the officers allocated to the State of Gujarat, with effect from May 1, 1950, you would have been appointed as Judge, City Civil Court, Ahmedabad on 4-11-1961 alongwith other District judges so appointed.

2. You would not have been appointed as Principal Judge, City Civil Court, Ahmedabad, at the relevant time.

20. The Registrar of this Court forwarded this recommendation of the High Court on its Administrative Side to the Government and the Government was moved to take necessary action to give effect to the view of the High Court vide its letter of December 20, 1979. The Deputy Secretary to the Government in Legal Department by his letter of January 28, 1980 wrote back to the Registrar requesting him, "to offer views of Their Lordships in connection with the pay and allowances admissible during the period of deemed appointment as Judge, City Civil Court, claimed by Shri N. J. Mankad taking into consideration the relevant case-law and particularly in the case of Shri T. U. Mehta and the provisions contained in Government Resolution, General Administration Department NJ. 2069/532-R, dated 28-8-1969" (emphasis supplied). The learned Advocate for the petitioner rightly criticised this letter of the Deputy Secretary to the Government while seeking the views of this Court on the Administrative Side, particularly because he had requested that these views may be expressed after taking into consideration the relevant case-law. This is to say the least, really out of test, particularly when the Deputy Secretary in the Legal Department addresses a letter to this Court. If the High Court, on its Administrative Side, unanimously decided about the suitability of one of the most senior District Judges for his promotion to the cadre of City Civil Judge and forwarded that recommendation to the Government, it is expected of the Government to consider the recommendation with all the seriousness it deserved and to remit the matter for further views of the Court with a request to express its view after taking into consideration the entire case-law, discloses the cavalier approach of the authority concerned in the Government. In reply to this letter, the Registrar of this Court by his letter of April 24, 1980 forwarded the views of the learned Chief Justice and other Judges of this Court. The said letter of the Registrar reads as under:

I am directed by the Honourable the Chief Justice and judges to invite a

reference to the Government letter. Legal Department, No. PAY-1079/5251/0, dated January 28, 1980, on the subject noted above, and to state that Their Lordships are of the view that, in principle, the case of Mr. N. J. Mankad, retired judge, City Civil Court, Ahmedabad, is identical with that of Mr. (lately the Honourable Mr. Justice) T. U. Mehta, the only factual difference between two cases being that while Mr. T. U. Mehta had the backing of a judgment of the High Court, Mr. Mankad did not have the same and therefore there is no justification in denying to Mr. Mankad, the benefit given to Mr. Mehta, only for his fault of having not approached a Court of law for the redressal of his grievance. I am therefore, to request you to kindly place the above view of Their Lordships before Government and move them to pass immediate orders sanctioning due monetary benefits to Mr. Mankad.

21. Some correspondence exchanged between the Registrar of this Court and the Legal Department and, in reply to the reminders, the Deputy Secretary to the Government in Legal Department intimated that the matter was under consideration, and ultimately by letter of May 1, 1981 addressed to the Registrar of this Court by the Deputy Secretary to the Government in Legal Department, it was stated that the request made by Shri N. J. Mankad, retired Judge, City Civil Court, Ahmedabad cannot be granted, I have directed the Registrar of this Court to place the report of the Committee as well as the relevant correspondence including the reminders and replies on the record of this petition which have been accordingly placed.

22. The documents produced from the file of the registry of this Court clearly disclose that the recommendation made by this Court on its Administrative Side in the matter of further promotion to Mr. Mankad, who was one of the senior most District Judges, in exercise of its power under Article 235 has been rejected. In any view of the matter, there is no purposeful and effective consultation as is obligatory under Article 233 inasmuch as the Government could not have ignored and rejected the recommendation of the High Court on its Administrative Side which was only competent and knowledgeable authority to recommend as to whether a particular Judicial officer should be promoted or not, and the entire matter has been dealt with in a, casual manner without proper constitutional perspective. No reasons have been assigned in the cryptic refusal of the claim of the Petitioner as intimated by the letter of May 1, 1981. The learned Government Pleader invited" my attention to the decision of the Supreme Court in Baldev Raj Guliani Vs. The Punjab and Haryana High Court and Others, , where, in the context of the recommendation made by the High Court in disciplinary proceedings held against a subordinate Judge, one of the questions which the Supreme Court was called upon to decide whether the Governor was bound to accept the recommendation of the High Court and to pass the order of removal of the judicial officer. The Supreme Court ruled that since the Governor is the ultimate authority to pass the order of removal it will not be correct always to insist that he has no authority even under certain extraordinary circumstances to decline to accept forthwith the particular recommendation, and that ordinarily

and as a matter of graceful routine, recommendations of the High Court are and should be always accepted by the Governor. However, when the High Court exercising disciplinary control over the subordinate judiciary finds, after a proper enquiry, that a certain officer is guilty of gross misconduct and is unworthy to be retained in judicial service and, therefore, recommends to the Governor his removal or dismissal, it is difficult to conceive how and under what circumstances such a recommendation should be rejected by the Governor. In this context, the Supreme Court emphasised more than once that the recommendation of the High Court in respect of judicial officers should always be accepted by the Governor, and that this is the inner significance of the constitutional provisions relating to the subordinate judiciary, and that whenever in an extraordinary case, rare in itself, the Governor feels, for certain reasons, that he is unable to accept the High Court's recommendations, these reasons will be communicated to the High Court to enable it to reconsider the matter. It is further held that it is, however, inconceivable that without reference to the High Court, the Governor would pass an order which had not been earlier recommended by the High Court since that will be contrary to the contemplation, in the Constitution and should not take place. I have not been able to appreciate how this decision can be of any assistance to the cause of the Government which the learned Government Pleader canvasses before me. It is no doubt true that under Article 233(1) as well as under the Recruitment Rules, it is the Governor who is the appointing authority and even assuming the alternative contention of the learned Government pleader to be well founded that since this is a case of initial promotion to the cadre of City Civil Judgeship, the power of appointment is entirely with the Governor though, of course, it is to be exercised in consultation with the High Court. On the ratio of Baldev Raj Guliani's case (supra), on which the learned Government Pleader has placed reliance in support of his contention, even where the appointing authority is Governor, by and large, he should accept the recommendation of the High Court, and in rare of the rarest cases he may, for valid and good reasons, defer from the recommendation of the High Court and refuse to act upon it. Even in such rare cases it is expected that the Governor, and for that matter the State Government, shares the reasons with the High Court and remit the matter for reconsideration of the High Court and to make appropriate recommendation in light of the reconsideration, In the present case what I find is that inspite of the unequivocal recommendation by the High Court on the first occasion recommending the case of the petitioner for grant of notional promotion in the cadre of City Civil Judges, and on the second occasion in reply to the view solicited by the Government for not only implementing this recommendation but also to pay consequential monetary benefits as a result thereof, the Government has, in a manner which can be said to be least graceful, refused to accept the recommendation without assigning any reasons whatsoever. There is also another additional aspect of this matter, which should be emphasised. The Registrar of this Court in his reply of April 25, 1980 conveyed the view of the learned Chief Justice and other learned Judges of this Court that the case of Shri T. U. Mehta was not at all distinguishable from that of

the petitioner since in effect and substance the question was whether the petitioner should be granted notional promotion as a result of the revision of the gradation list as was done in the matter of Mr. T. U. Mehta, and to pay consequential monetary back benefits. It is no doubt true that in case of Mr. T. U. Mehta there was judicial decision of this Court upholding the claim of Mr. T. U. Mehta. But that is a distinction without any difference, because in the ultimate analysis, the question was whether an officer who had been denied promotion on the ground of provisional seniority list is entitled to be promoted retrospectively in light of the revised seniority list, and if in case of Mr. T. U. Mehta the Government has accepted this judicial decision without taking it further in appeal in the higher Court, it is not easy to comprehend as to on what grounds the State Government has decided to reject the claim of the Petitioner inspite of the unequivocal recommendation of the High Court on its Administrative Side in his favour. It should be recalled that in Special Civil Application No. 912 of 1974 filed by Mr. T. U. Mehta the State Government had opposed the claim for payment of back benefits in light of the directions of the State Government in the Government Resolution of the erstwhile State of Bombay dated March 10, 1960, which objection was negatived by the learned Single Judge of this Court on the ground that it was not a case of erroneous fixation of the seniority but was a case of wrong application of the principles of seniority. In other words, the learned Single Judge has held that the State Government could not have fixed the seniority of the ex-Saurashtra employees by deducting five years service without the prior approval of the Central Government since otherwise it would be in violation of Section 115 of the States Re-organisation Act and, therefore, it would be without authority and jurisdiction and clearly therefore the principle was bad in law and void. What I am trying to emphasise is that the State Government was accepted this decision and granted all the back benefits to Mr. T. U. Mehta. It, therefore, cannot be said particularly when the matter was not taken in the higher Court from the decision of the learned Single Judge that the State Government was compelled to make the payments. If, therefore, the State Government has thought fit to accept the decision, without-taking it in further appeal, it would amount to clear act of discrimination if it decides not to follow the same in case of the Petitioner, The decision of the State Government, therefore, also suffers from the infirmity of violating Articles 14 and 16 of the Constitution and, therefore, also the decision is bad in law and liable to be quashed and set aside.

23. The learned Government Pleader, therefore, urged that in any view of the matter, the Petitioner is not entitled to payment of arrears of difference in the salary he would have drawn if he had been promoted as City Civil Judge in November, 1961, and the salary which he actually drawn till he was promoted in June, 1965 in light of the directions contained in the Government resolution of the erstwhile State of Bombay dated March 10, 1960 as reiterated in Gujarat Government's resolution of 28-8-1968. This objection of the learned Government Pleader cannot be upheld obviously for three reasons. In the first

place, the High Court on its Administrative Side, had recommended to the State Government to pay immediately the monetary benefits to the Petitioner after promoting him notionally to the cadre of City Civil Judges with effect from 4-11-1961, though the Deputy Secretary to the Government in Legal Department by his letter of January 28, 1980 had solicited the view of this Court after drawing attention to this very resolution. The learned Chief Justice and other Judges of this Court, after considering all the relevant aspects which will include the said Resolution referred to by the State Government recommended not only to immediately grant notional promotion to the Petitioner but pay him all the monetary benefits to which he is entitled as a result thereof. Secondly, in Special Civil Application No. 912 of 1974 filed by Mr. T. U. Mehta, this Court has held that the said resolution is not applicable on the facts of the case before the Court since the case of Mr. T. U. Mehta was not a case of fixation of wrong seniority but was a clear case of wrong application of the principles of seniority and, therefore, the decision of the Supreme Court in *The State of Maharashtra and Another Vs. Vinayak*, was not applicable. On the same parity of reasoning, therefore, in the present case also the said resolution would not be applicable. Thirdly, I do not think that this circular can be invoked in cases where the High Court in its Administrative side has recommended for the grant of all monetary benefits as a result of the notional promotion in exercise of its power under Article 235 of the Constitution, or in course of consultation with the Government under Article 233 of the Constitution.

24. For the reasons aforesaid, therefore, the impugned decision of the State Government contained in the letter of May 1, 1981 refusing to grant notional promotion and the monetary benefits as a result thereof is quashed and set aside by appropriate writ. The State Government is further directed to grant the promotion and pay the arrears of the difference in salary to which the petitioner would have been entitled if he had been so promoted and the actual salary drawn by the petitioner as District Judge till he was actually promoted on June 12, 1965 as City Civil Judge according to the recommendation of this High Court on its Administrative Side as conveyed by the letters of December 20, 1979 and of April 24, 1980 to the State Government.

25. The learned Advocate for the petitioner also pressed for the claim of payment of interest on this amount of arrears from the date of refusal by the Government to accept the recommendation till payment. I do not think that the Petitioner would be entitled as a matter of right to receive any interest on this amount of difference in the salary.

26. The State Government shall calculate the amount that is due to the petitioner and make payment within four weeks from the date of the receipt of the writ.

The result is that this petition is allowed and Rule is made absolute accordingly with costs.

27. S.T. Mehta, learned Assistant Government Pleader for the State Government

makes an oral application that the implementation of this order be stayed for a period of four weeks so as to enable the State Government to decide whether it should file any appeal from this order. Since the State Government has been given four weeks time to calculate and make payment, it is not necessary to stay the implementation of this order.