
(1964) 11 RAJ CK 0009
In the Rajasthan High Court
Case No : Writ Petition No. 803 of 1964

Prem Nath and Others

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 27-11-1964

Acts Referred:

Constitution of India, 1950 — Article 233, 233(2), 235, 236, 309
Rajasthan Higher Judicial Service Rules, 1969 — Rule 10, 13, 22, 23, 24

Citation : (1965) RLW 14

Hon'ble Judges : V.P. Tyagi, J; C.B. Bhargava, J

Bench : Division Bench

Advocate : M.B.L. Bhargava, for the Appellant; Gulab Chand Kasliwal and Raj Narain Munshi, for the Respondent

Judgement

Bhargava, J.—The petitioners who are all members of the Rajasthan Judicial Service have submitted this application under Article 326 of the Constitution of India against the State of Rajasthan (Respondent No. 1), the Hon'ble Chief Justice Slid D.S. Dave, Hon'ble Justice I. N. Modi, Judge High Court Rajasthan and Administrative Judge, High Court Rajasthan Hon'ble Justice D.M. Bhandari, Judge, Rajasthan High Court (Respondents Nos. 2 to 4) and the Rajasthan Public Service Commission through its Chairman praying for a writ of prohibition against the respondents Nos. 2 to 4 from holding interview or selecting or recommending the appointment of candidates for direct judicial appointments to the post of Civil and Additional Sessions Judges, or any other such judicial post to the Governor or declaring the result thereof and further for declaration that the Rajasthan Higher Judicial Service Rules, 1955 (hereinafter called the Rules) are void and illegal.

In the alternative it is prayed that the proceedings of the Recruitment Committee for selection of candidates be held to be illegal and be quashed because of non-compliance with the provisions of Rule 10 of the Rules and further the Selection Board be prohibited from filling vacancies in the Higher Judicial Service

exceeding one fourth of the vacancies which have fallen vacant during the current year and the result should not be declared till selection from Judicial Service takes place as required by Rule 13 of the Rules and for any other appropriate writ or order.

2. On 9th May, 1955, His Highness the Raj Pramukh of the then (Part B) State of Rajasthan in exercise of the powers conferred by the proviso to Article 309 of the Constitution, made rules regulating recruitment to post in, and the condition of service of the persons appointed to the Rajasthan Higher Judicial Service. These rules were first published in Rajasthan Gazette Extra-ordinary Part IV (C) dated 12th May, 1955 in Appointment Department Notification No. F. 21(3) Appts. (C) 55. Some of the relevant rules are as under:

"Part I.--General.

Rule 1. Short title and commencement.

(1) These rules may be called the Rajasthan Higher Judicial Service Rules, 1955.

(2) They shall come into force at once and shall apply to the members of the Service consisting of District and Sessions Judges and Civil and Additional Sessions Judges.

Rule 3. Status of the Service--

The Rajasthan Higher Judicial Service is a State Service.

Rule 4. Definitions.-

In these rules unless there is anything repugnant in the subject or context:--

(b) "Court" means the High Court of Judicature for the New State of Rajasthan.

(c) "direct recruitment" means recruitment in the manner prescribed by Clause (ii) of sub-rule (1) of Rule 7.

(e) "member of the service" means a person appointed in a substantive capacity to a post in the cadre of the service under the provisions of these rules or of orders superseded by Rule 2;

(g) "Service" means the Rajasthan Higher Judicial Service.

Part II.--Cadre,

Rule 6. Strength of the Service.-

(1) The strength of the Service and of each class of posts therein shall be determined by the Governor from time to time in consultation with the Court.

2. The permanent strength of the Service and of each class of posts therein shall, until orders varying the same have been passed under Sub-rule (1), be as specified in Schedule 1.

3. The Governor may, from time to time and in consultation with the Court, leave unfilled or hold in abeyance any post in the Service without thereby entitling any person to compensation, or create such additional temporary or permanent posts in the Service as may be found necessary.

Part III.--Recruitment.

Rule 7. Sources of Recruitment.-

(1) Subject to the other provisions of these rules, recruitment to the Service shall be made to the posts of Civil and Additional Sessions Judges:--

(i) by promotion from among the members of the Rajasthan Judicial Service; or

(ii) by direct recruitment in consultation with the Court.

(2) Persons eligible for direct recruitment under Clause (ii) of Sub-rule (1) of this rule shall be Advocates or Pleaders of more than seven years" standing.

Rule 8. Appointments to the Grade of District and Sessions Judges.-

All appointments to the grade of District and Sessions Judges shall be made by the Governor in consultation with the Court, with due regard to seniority and fitness for such appointment, provided that in making appointments against the posts of (i) Legal Remembrancer-cum-Law and Judicial Secretary to Government, (ii) Registrar, High Court and (iii) Joint Legal Remembrancer to Government in a temporary capacity, as may be necessary from time to time, the sole criterion shall be the fitness of an officer for such appointment.

Rule 8A. (1) Appointments to the Selection Grade posts of District and Sessions Judges.

The appointments to the selection grade posts of the District and Sessions Judges shall be made by the Governor, in consultation with the Court, by promotion from amongst officers holding substantively the posts of District and Sessions Judges, on the basis of seniority cum merit.

2. The first appointment made in pursuance of Sub-rule (1) shall take effect from the 1st day of January, 1961.

Rule 10. Number of appointments to be made.-

(1) Subject to the provisions of these rules, the number of persons to be recruited at each recruitment from each of the two sources specified in Rule 7 and the period (not exceeding three years) for which such recruitment is to be made shall be determined by the Governor;

Provided that the number of persons appointed to the service by direct recruitment shall at no time exceed one-fourth of the total strength of the Service and the number of persons so appointed during any one period of recruitment shall not exceed one-fourth of the total number of vacancies

occurring during that period:

Provided further that if the number of vacancies occurring during any period of recruitment is less than four, the proportion of direct recruits during that period of recruitment may be increased by the Governor so as not to exceed one-half of the total number of such vacancies subject to the condition that the total number of persons appointed to the service by direct recruitment does not at any time exceed one-fourth of the total sanctioned strength of the Service.

2. If at any recruitment the number of selected direct recruits available for appointment is less than the number of recruits decided by the Governor to be taken from that source, the Governor may increase correspondingly the number of recruits to be taken by promotion from the Rajasthan Judicial Service.

Part IV.--Procedure for Recruitment by promotion.

Rule 11. Experience.--No member of the Rajasthan judicial Service shall be eligible for promotion to the Service unless he has completed 7 years of service in that service:

Provided that if prior to the constitution of the Rajasthan Judicial Service, he has served as a Judicial Officer or on a post, corresponding to any of the posts encadred in that service, in a Covenanted State or in Rajasthan, the period of such service shall count as service as a member of the Rajasthan Judicial Service.

Rule 12. Criteria for Selection.-

(1) For the purpose of recruitment to the Service by promotion under Clause (i) of Sub-rule (1) of Rule 7, the selection shall be made on the basis of merit from among the members of the Rajasthan Judicial Service eligible for such promotion.

(2) In selecting candidates for promotion, regard shall be had to the record of every eligible officer as regards the quality of his work and his trustworthiness and fitness for appointment to the Service. No one shall be considered fit unless he is clearly an officer of more than average ability and his integrity is certified.

Rule 13. Procedure for Selection.-

(1) After a decision is taken under rule 10 as to the number of persons to be recruited by promotion, the selection shall be made by a Selection Committee consisting of the Chief Justice, the Administrative Judge and a Judge of the Court nominated by the Chief Justice, from among the eligible members of the Rajasthan Judicial Service.

(2) The Selection Committee shall select from among the eligible officers those whom they consider suitable for appointment to the Service. A list of the Officers selected shall then be made in the order of their inter se seniority in the Rajasthan Judicial Service. At the time when a fresh list has to be drawn up, the cases of all eligible officers will again be considered by the Selection Committee on merits.

Part V.--Procedure for direct recruitment.

Rule 14. Age.--A candidate for direct recruitment to the Service must have attained the age of 35 years and must not have attained the age of 45 years on the first day of January following the date of selection.

Rule 16. Character and Physical fitness.-

(1) The Character of a candidate for direct recruitment must be such as to render him suitable in the opinion of Governor in all respects for appointment to the Service. He must produce a certificate of good character from the District Judge of the District in which he has been practising as lawyer and two such certificates, written not more than six months prior to the date of submission of application to the Court, from two responsible persons not connected with his school, college or university and not related to him.

Note:--Persons dismissed by the Union Government or by a State Government shall be ineligible for appointment.

(2) No person shall be appointed as member of the service by direct recruitment unless he is in good mental and bodily health and free from any physical defect likely to interfere with the efficient performance of his duties as a member of the Service. Before a candidate is finally approved for appointment by direct recruitment, "he shall be required to appear before a Medical Board who will examine him and certify him as fit or unfit for appointment to the Service; provided that a candidate selected from among judicial officers, who has already been examined and declared fit by a Medical Board in connection with his appointment as a judicial officer shall not be required to appear before a Medical Board again under this sub-rule prescribed by the Governor for the purpose.

Rule 17. Notice Recruitment.-

Applications for direct recruitment to the Service shall be invited by the Court by publishing a notice to that effect in the Rajastban Gazette and in such other manner as it may deem fit.

Rule 21. Scrutiny of applications and interviews.-

(1) The Selection Committee appointed under Rule 13 shall scrutinise the applications received by the Court in accordance with the provisions of Rule 19 and require such of the eligible candidates as seem best qualified for appointment to the Service under these rules to appear before the Committee for interview at their own cost.

2. In assessing the merits of a candidate, the Selection Committee shall have due regard for his professional ability, knowledge of Hindi written in Devnagri script, character, personality, physique and general suitability for appointment to the Service as indicated by his record and interview.

Rule 22. Selection.--The Selection Committee shall prepare a list of candidates

whom they consider suitable for appointment to the Service, in order of merit.

Part VI.--Appointments, Probation and Confirmation.

Rule 23. Submission of lists to the Governor.-

The Court shall submit to the Governor two copies each of the two lists of candidates considered suitable for appointment to the Service from the two sources of recruitment as prepared in accordance with Rules 13 and 22.

Rule 24. Appointments.-

(1) Subject to the provisions of Sub-rule (2) all appointments to posts in the Service shall be made by the Governor on the occurrence of substantive vacancies by taking candidates from the lists prepared under Rules 13 and 22 in the order in which they stand in the respective lists provided the Governor is satisfied that such candidates are duly qualified for appointment to the Service in all respects. The first three vacancies shall be filled from the list prepared under Rule 13 and the fourth vacancy shall be filled from the list prepared under Rule 22 and so on;

Provided that if the number of vacancies to be filled is less than four, the vacancy or vacancies to be filled from the list prepared under Rule 13 shall be filled first and the remaining vacancy shall be filled from the list of direct recruits.

2. The Governor may make appointments to fill temporary or officiating vacancies from among persons who are eligible for appointment to the Service by promotion under Rule 7(1)(i) of these rules; provided that, as far as may be, such appointments shall be made from the list prepared under Rule 13, and that other members of the Rajasthan Judicial Service shall be considered for such appointments only after the aforesaid list has been exhausted.

Rule 25. Seniority.--Subject to the other provisions of the rules, seniority in the Service shall be determined by the date of the order of appointment in a substantive vacancy.

Provided that the Seniority of candidates appointed to the Service shall, in the case of appointment of more persons than one to the Service by an order of the same date, follows the order in which their names have been placed in the list prepared under Rule 13 or Rule 22, as the case may be, excepting, in the case of appointment by direct recruitment under Rule 7 (1) (ii), persons who do not join the Service when a vacancy is offered to them.

Rule 26. Probation.--All persons appointed to the Service by direct recruitment under Rule 7 (1) (ii) shall be placed on probation for a period of two years.

Rule 27. Extension of probation period or Removal.-

(1) If it appears at any time during or at the end of the period of probation that an officer has not made sufficient use of his opportunities or if he has otherwise failed to give satisfaction, the Governor may dispense with his service;

Provided that the Governor may, in special cases, extend the period of probation of such officer by a specified period not exceeding one year.

2. An Officer whose services are dispensed with during or at the end of the original or extended period of his probation under Sub-rule (1) shall not be entitled to any compensation.

Rule 28. Confirmation.-

1. A probationer shall be confirmed in his appointment at the end of the original or extended period of his probation, if the Governor, after consultation with the Court, is satisfied that he is fit for confirmation.

2. All confirmations under this rule shall be notified in the Rajasthan Gazette."

3. That by a notice dated 20th November, 1963, Est/RJS/178, the Rajasthan High Court, Jodhpur invited applications for direct recruitment to the Higher Judicial Service and in paragraph 2 it was mentioned that the number of vacancies to be filled by direct recruitment was four. Applications were received from a number of candidates in response to the above notice and after their scrutiny interview of the eligible candidates by the Selection Committee appointed under Rule 13 had started and at that stage the present application was moved praying for the reliefs mentioned above. By the time this application came for admission the Selection Committee consisting of respondents Nos. 2-4 had finished its task of interviewing the candidates. However, appointments to the posts have not so far been made.

4. The main points raised on behalf of the petitioners can thus be summarised:

1. that under the Constitution appointments of the District Judges can be made according to the provisions of Article 233 while appointments of persons other than District Judges can only be made in accordance with rules made under Article 234. But the present rules having been made by the Raj Pramukh under Article 309 of the Constitution which is subject to other provisions of the Constitution, are wholly illegal and void.

2. that the rules relating to recruitment to the service are void because they contravene the provisions of Articles 233 and 234 and put an embargo upon the powers of the Governor and the High Court.

3. that the post of Civil and Additional Sessions Judge to which recruitment is made under the rules is not included within the expression "District Judge" as defined under Article 236 of the Constitution.

4. that the determination of number of persons to be recruited at each recruitment and the period for which such recruitment is to be made by the Governor in a prerequisite as per Rule 10 of the rules and that having not been done, the Selection Committee was not competent to interview the candidates and no appointments can be made on the basis of such selection.

5. that the period envisaged under Rule 10 is a prospective one and not retrospective and as such the number of vacancies determined by the Governor at 18 (as is the case of respondents Nos. 1 to 4) is not correct and as such the notice inviting applications for four vacancies was clearly wrong and prejudicial to the interests of the petitioners.

6. That in any event nine vacancies had been filled up before the period was determined by the Governor and in that case too, not more than two vacancies could be filled by direct recruitment.

7. That the Judicial Officers who are working in officiating capacity as Civil and Additional Sessions Judges should be deemed to be holding these posts in substantive capacity because no officiating appointments are envisaged under the rules and as such their seniority should not be affected by appointments made by direct recruitment.

5. Respondents Nos. 2 to 4 and Respondent No. 1 have filed similar though separate replies to the petition. Notice of the petition was also given to the Advocate General and he has also filed a statement of the case.

6. The respondents in their replies have supported the validity of rules framed by the Raj Pramukh in exercise of the powers under proviso to Article 309 and have urged that they in no way abridge or limit the powers of the Governor or of the High Court under Article 233. Further it is urged that these rules were in fact made by the Rajpramukh in consultation with the State High Court and as such they should be deemed to have been made under proviso to Article 309 read with Article 233 of the Constitution of India even though the notification under which they were published does not mention Article 233. It is urged that the post of a Civil and Additional Sessions Judge is included in the expression District Judge as defined in Article 236 and as such appointment of Civil and Additional Sessions Judge is governed by Article 233 of the Constitution and Article 234 has no application.

It is denied that Rule 10 was not complied with and it is submitted that the Governor had determined the number of vacancies as well as the period for which the recruitment was to be made. It is urged that petitioners who are holding the post of Civil and Additional Sessions Judges in officiating capacity cannot claim any right to that post unless they are substantively appointed to the post in accordance with the rules and until such appointments are made the posts shall be deemed to be vacant. It is urged that there is nothing in Rule 10 which prohibits the Governor in determining the "period" both past and future upto a maximum of three years in which the vacancies are likely to occur. It is also urged that appointments to the post of Civil and Additional Sessions Judge shall be made from both the sources i.e., by promotion from the number of the Rajasthan Judicial Service and also by direct recruitment simultaneously.

7. Provisions relating to the recruitment and control of subordinate judiciary are contained in Chapter VI of the Constitution of India: in Articles 233 to 237.

Article 233 provides that the appointments of persons to be, and the posting and promotion of district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

A person not already in the service of the State who has been for not less than seven years an Advocate or Pleader on being recommended by the High Court shall be appointed as a District Judge by the Governor.

Article 234 provides that appointments of persons other than district judges to the Judicial Service are to be made by the Governor in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and the High Court.

Article 235 relates to the control of the High Court over the subordinate courts.

Article 236 defines the expression "District Judge and "judicial service".

Article 237 provides for the application of Chapter VI and rules made thereunder to any class or classes of magistrates.

8. It is in the background of the above constitutional provisions that the objections raised on behalf of the petitioners and validity of the impugned rules are to be determined.

9. It is admitted on behalf of the respondents that the impugned rules were not framed under Article 234 and the petitioners also conceded that rules so far as they relate to conditions of service of members of the judicial service are not challengeable.

10. The real controversy between the parties is in regard to the rules contained in parts III, IV, V and VI of the rules relating to recruitment to the Higher Judicial Service. The contention is that the Governor has no jurisdiction under Article 309 to frame rules with regard to the recruitment to the judicial service whether it be of District Judges or other than District Judges because under the Constitution such rules can be made only in accordance with the provisions of Articles 233 and 234 of the Constitution. It is contended that independence of the judiciary would be seriously impaired if power to frame rules in regard to recruitment to judicial service in the State is held to vest in the State Legislature or the Governor under Article 309 which is expressly made subject to the other provisions of the Constitution. It is pointed out that Articles 233 and 234 are special articles dealing with the appointment of District Judges and of persons other than the District Judges and all appointments to the judicial service should be strictly made in compliance with the aforesaid provisions.

Reliance is placed on *N. Devasahayam v. State of Madras*, AIR 1958 Mad 53 and *Rajvi Amar Singh Vs. State of Rajasthan*, We agree that Articles 233 and 234 govern the appointments of the District Judges and other officers falling within that category as defined under Article 236 of the Constitution and of persons

other than District Judges and the power conferred upon the State Legislature and the Governor under Article 309 and its proviso is subject to the provisions of the Constitution as its opening words show and therefore the rules framed in that behalf must satisfy the requirements of the said Articles of the Constitution. Since in the present case the rules do not relate to the appointments of persons other than District Judges as defined under Article 236 of the Constitution as we shall presently discuss, it is unnecessary to determine their validity in the light of the provisions of Article 234 of the Constitution but has to be judged in the light of Article 233 only.

Article 309 in our view, contains a general provision empowering the Governor of a State to make rules regulating the recruitment and the conditions of service of persons appointed, to public services and posts in connection with the affairs of any State until the appropriate legislature makes any enactment in that behalf, These general provisions are however subject to the other provisions of the Constitution. Therefore, Article 309 will have to be read as subject to the provisions of Article 233 of the Constitution that means that if any rules are framed by the Governor under proviso to Article 309 relating to the appointment of District Judges they must be in conformity with the provisions of Article 233 of the Constitution. If that requirement is satisfied, we do not see any valid reason to reject those rules simply because they purport to have been made under Article 309, Supposing the rules framed by the Governor under proviso to Article 309 contain provisions for consultation with the High Court as regards the selection of candidates and their appointments to the post of a District Judge we do not see why such rules should be regarded as violative of Article 233 of the Constitution. No doubt Article 309 is subject to Article 233 of the Constitution but if the rules framed under Article 309 do not violate the provisions of Article 233 such rules cannot be said to be unconstitutional, or without jurisdiction. We are unable therefore, to agree with the broad contention urged by the learned counsel for the petitioners that the rules should be struck down on the ground that they were framed by the then Raj Pramukh under the proviso to Article 309.

In the Madras case relied upon by the learned counsel the controversy was with regard to the correct interpretation of Article 234 as to whether the consultation referred to in the Article is with reference to the "appointments" with which the Article opens or to the framing of the rules in pursuance of which the appointments should be made and it was held that:

"Article 234 confers an independent rule-making power subject to the specific condition that it should be framed in consultation with the Public Service Commission and the High Court. The absence of a comma or other punctuation mark in the Article which could serve to specify "the appointment" as the event which requires the consultation, the expression "foregoing provisions", of this Chapter and any rules made thereunder, in Article 237 and the terms of Section 255 of the Government of India Act 1935, support this view."

In *Rajvi Amar Singh Vs. State of Rajasthan*, also the court was concerned with

Article 234 of the Constitution and it was held "that the appointment of persons in the judicial services (other than District Judges) has to be made in accordance with the provisions of Article 234 and from among such members of the judicial service the appointment of District Judges can be made (an exception having been made in the case of Advocates and Pleaders)." In our view these cases are of no help to the petitioners.

11. Article 233 makes a provision for the appointments of persons to be, and the posting and promotion of, District Judges by the Governor in consultation with the State High Court. In the case of persons not already in the service of the State appointments are to be made by the Governor on the recommendation of the High Court provided the candidate has been for not less than seven years an advocate or a pleader. Consultation can be made with the High Court as and when occasion for appointment, posting and promotion to the post of a District Judge might arise. Similarly, the High Court can make recommendation for the appointment of a person who is not already in the service of the State as and when such occasion might arise. If instead of making consultation with the High Court on every occasion for each individual case the Governor in consultation with the High Court makes rules regulating the recruitment of persons to such service, in our view it would not be violative of any constitutional provision. We may at this stage point out that during the course of arguments an affidavit of Shri Sukh Deo Mirdha, Registrar, Rajasthan High Court who had been also appointed officer in charge in this case, was filed before us on behalf of the respondents. In paragraph 2 of the affidavit it is stated that:

"The draft of the Rajasthan Higher Judicial Service Rules was received in the High Court for examination and approval and that the High Court after examining the said draft communicated its approval for framing of the Rules as contained in the letter dated 20-12-1954. Further on 1-4-55 when the then Chief Justice was at Jodhpur, a Conference of Law Ministers and Hon"ble Chief Justice took place and in the said Conference this question was further discussed and then finally the Rajasthan Higher Judicial Service Rules were made by the Raj Pramukh with the consultation of the High Court and a notification in this connection was issued on 9-5-1955."

12. On behalf of the petitioners no affidavit in reply was submitted even though we gave them opportunity to do so. We do not see any reason to doubt the correctness of the statement made by Shri Mirdha in this affidavit. We, therefore, believe that the rules were framed by the then Raj Pramukh in consultation with the High Court of Rajasthan. An objection was taken on behalf of the petitioners that the affidavit of Mr. Mirdha was inadmissible and cannot be used to supply a patent defect in the rules inasmuch as the notification issuing the rules, specifically says that they were framed under Article 309 of the Constitution, Therefore, evidence cannot be given to show that they were made in consultation with the High Court. Reliance was placed on Rai Brinandan Parshad and Others Vs. Mahabir Prasad and Others, Gobind Das v. Rup Kishore, AIR 1924

Lah 65 ; K.V. Subramania Aiyar and Others Vs. Shanmugam Chettiar and Others, and Keshavlal Lallubhai Patel and Others Vs. Lalbhai Trikumlal Mills Ltd., We do not see how these cases have any application on this question. There is no ambiguity in the notification so as to attract the application of Section 93 of the Evidence Act and we do not see why evidence cannot be given to show that the rules were in fact framed in consultation with the High Court. We, therefore, overrule this objection.

13. We may also dispose of the contention made by the learned Advocate General as also by the learned Deputy Government Advocate appearing on behalf of respondents from 2 to 4 that consultation of the High Court under Article 233 of the Constitution is not mandatory but is only directory. Learned Deputy Government Advocate in this connection relied upon AIR 1945 67 (Federal Court) Montreal Street Rly. Co. v. Normandin, 1917 AC 170: AIR 1917 PC 142 ; Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others, K.S. Srinivasan v. Union of India, AIR 1955 SC 419 and L. Hazari Mal Kuthiala Vs. The Income Tax Officer, Special Circle, Ambala Cantt., As we have already said that we are satisfied on the affidavit of Shri Mirdha that the rules were framed in consultation with the High Court, it is not necessary to pronounce any final opinion upon this question. But in our opinion such interpretation would not only militate against the directive principle contained in the Constitution as regards the separation of the judiciary from the executive, but would create a serious conflict between Articles 233 and 235 because under the latter control over the subordinate judiciary which includes the District Judge also is vested in the High Court.

14. The validity of the impugned rules has therefore, to be judged with respect to the provisions of Article 233 of the Constitution. These rules lay down the sources of recruitment, criteria for selection by promotion, procedure for selection and direct recruitment and finally submission of list by the High Court to the Governor as prepared in accordance with Rules 13 and 22 for appointments to the Higher Judicial Service. Appointments to the service under the rules is to be made by the Governor from the list prepared under Rule 13 and Rule 22 in the order in which the candidates stand in the respective list. This list under the rules is prepared by a selection committee consisting of the Chief Justice, the Administrative Judge and a Judge in the Court nominated by the Chief Justice and finally the list is submitted by the Court to the Governor.

15. Learned counsel for the petitioners was very critical of the general scheme of these rules and of some rules in particular. It was contended that Article 233 envisages consultation with the High Court which means the Chief Justice and all other Judges of the High Court, while under the rules the selection is made by a committee of three Judges who prepare a list of candidates whom they consider suitable for appointments from both the sources. This it is urged, cannot be regarded as consultation with the High Court. We agree that in the matter of appointment, posting and promotion of District Judges consultation with the High Court under Article 233 means consultation with the full Court and not with a

Committee consisting of the Chief Justice and a few Judges. But we do not agree that consultation under the rules is with the Selection Committee and not with the Court because finally it is the High Court which submits the list of suitable candidates for appointment to the Governor under Rule 23. We also do not agree with the learned counsel that the court only forwards the list as prepared by the Selection Committee and has no power to modify it. In our opinion no such inference can be drawn on the language of Rules 22 and 23. There is nothing in these rules which precludes the "Court" from modifying the list prepared by the Selection Committee. Under the Rules it is not the Selection Committee which submits the list to the Governor, but it is the Court and therefore, it cannot be said that it contravenes the provisions of Article 233. In the nature of the task involved in selecting the candidates it is not practicable that all the Judges of the High Court should sit to interview the candidates and therefore, under the rules this work is entrusted to a Selection Committee whose recommendation then goes to the Court which finally submits it to the Governor. Rules 7(ii) and 8(A) also clearly say that recruitment to the service by direct recruitment, appointments to the grade of District and Sessions Judges and to the selections grade posts of the District and Sessions Judges shall be made by the Governor in consultation with the High Court. We, therefore, overrule this objection.

16. It is next contended that under the rules direct appointment to the post of Civil and Additional Sessions Judges cannot exceed 1/4th of the total number of vacancies and thus an embargo is put on the powers of the High Court and the Governor in making appointments under Article 233(2). We are, however, unable to agree. When appointments are required to be made from two sources it is just and reasonable that the interest of both should be properly safeguarded and a proper proportion be fixed for recruitment from both the sources. This in our view is not curtailment of the power but is only its regulation.

17. Then it is argued that under Rule 24 final decision for appointment rests with the Governor and the High Court has no say in the matter at that stage and thus Article 233(1)(ii) is violated. It is evident that under Article 233 Governor is the appointing authority and final decision must therefore, rest with him. But the appointments are to be made from the list prepared under Rules 13 and 22 and sent by the Court in the order in which the candidates stand in the respective lists. Further first three vacancies are required to be filled from the list prepared under Rule 13 and the fourth vacancy from the list prepared under Rule 22. The provision in Rule 24 that the appointments shall be made "provided the Governor is satisfied that such candidates are duly qualified to the service in all respects" only means that at the time of making appointments also the Governor will see that the proposed candidates possess the requisite qualifications as required by the Constitution and the rules. This is not to say that the Governor can pick and choose out of the list and make appointments according to his own discretion. We, therefore, do not see any force in this objection.

18. It is next contended that under the rules no person can be appointed directly

to the post of District Judge and his first appointment necessarily has to be made as Civil and Additional Sessions Judge and this again violates Article 233 of the Constitution. In our opinion there is no substance in this contention. In the first instance there is no warrant for the suggestion that Article 233 envisages only direct appointment to the post of a District Judge and not to any other post included in that expression as given in Article 236. The term "judicial service" as defined in Article 236 contemplates two cadres; one consisting exclusively of persons intended to fill the post of District Judge and the other of Civil Judicial posts inferior to the post of District Judge. The rules lay down the procedure for appointments to the post in the first cadre known as Rajasthan Higher Judicial Service and recruitment to the other cadre is made under the Rajasthan Judicial Service Rules, 1955 framed by the then Raj Pramukh in exercise of the powers conferred by Article 234 read with Article 237 and the proviso to Article 309 of the Constitution of India. Moreover, there is no prohibition in the rules against making direct appointments to the post of a District Judge.

19. Our conclusion therefore, is that the then Raj Pramukh was competent to frame rules for the appointment of District Judges under Article 309, provided they were not violative of Article 233 of the Constitution. Further our conclusion is that the Rajasthan Higher Judicial Service Rules were in fact made in consultation with the High Court of Rajasthan and they do not in any way conflict with the provisions of Article 233 of the Constitution.

20. We next examine the contention that the post of a Civil and Additional Sessions Judge to which appointment by promotion or direct recruitment is envisaged under the rules is not included within the expression District Judge as defined in Article 236 and therefore, the rules could only be made in accordance with the provision of Article 234 of the Constitution. It is urged that the expression "District Judge" no doubt includes an Additional Sessions Judge but does not include Civil and Additional Sessions Judge. It is urged that under the Rajasthan Civil Courts Ordinance, 1950 (Ordinance No. VII of 1950) there are only four classes of civil courts viz., (1) court of the District Judge, (2) court of the Additional Judge, (3) court of the Civil Judge and (4) court of the Munsif and it is by virtue of their office that powers of Additional Sessions Judge are conferred on a Civil Judge. Therefore, a civil and Additional Sessions Judge basically remains a Civil Judge.

Learned counsel in this connection has invited our attention to notifications issued for conferring powers of Additional Sessions Judges upon Civil Judges. It has however, to be mentioned that the Civil Courts Ordinance relates to the constitution of Civil Courts in Rajasthan and has nothing to do with the constitution of criminal courts which are constituted u/s 9 of the Code of Criminal Procedure. The incumbent to the post of a Civil and Additional Sessions Judge occupies a dual capacity. He is an Additional Sessions Judge so far as his criminal powers are concerned and he also exercises powers of a Civil Judge in civil matters. Simply because the incumbent also happens to exercise the powers of

Civil Judge it cannot be held that he is not an Additional Sessions Judge. As regards the conferring of powers of Additional Sessions Judges to Civil Judges by virtue of their office it may be pointed out that u/s 15 of the General Clauses Act "an appointment can be made or power can be conferred either by name or by virtue of office."

In the notification pointed out to us, power of Additional Sessions Judge has been conferred upon Civil Judges by virtue of their office. Section 39 of the Code of Criminal Procedure also lays down that

"the State Government may, by order, empower persons specially by name or in virtue of their official titles".

In this connection see also *In re, In Re: Palanisamy Chettiar*, We are clearly of the view that a civil and Additional Sessions Judge though discharging both civil and Criminal functions is nonetheless an Additional Sessions Judge and is included in the term "District Judge" as given in Article 236 of the Constitution and Article 233 governs his appointment and not Article 234.

21. Having upheld the validity of the rules for the appointment of Civil and Additional Sessions Judges in the Rajasthan Higher Judicial Service we next consider the contention that Rule 10 was not complied with before applications were invited for the posts to be filled by direct recruitment. This at once brings us to the question of the correct interpretation of the above rule. On behalf of the petitioners the contention is that the period of recruitment required to be determined by the Governor under the said rule can only be prospective though not exceeding three years and the past period cannot be taken into consideration at all. In other words the selection of the candidates is to be made in advance and appointments when substantive vacancies occur. It is urged that a combined reading of Rules 10, 13, 22, 23 and 24 also leads to the same conclusion.

Stress is laid in this connection on the provisions of Rule 24 which says that

"all appointments to posts in the service shall be made by the Governor on the occurrence of substantive vacancies by taking candidates from the lists prepared under Rules 13 and 22 in the order in which they stand in the respective lists, provided the Governor is satisfied that such candidates are duly qualified for appointment to the Service in all respects. The first three vacancies shall be filled from the list prepared under Rule 13 and the fourth vacancy shall be filled from the list prepared under Rule 22 and so on."

Assuming that the period mentioned in Rule 10 is the future period for which recruitment is to be made we do not see any reason why in fixing the number of vacancies for fresh recruitment the Governor cannot take into account the number of vacancies which have remained unfilled for any reason after the last recruitment.

There is no rule which makes it obligatory upon the Governor to make recruitment to the Higher Judicial Service annually or after a regular interval of

period. It is also possible that after the last recruitment unforeseen vacancies might occur and remain unfilled until a fresh recruitment takes place. Such existing vacancies can in our view be certainly taken into account in fixing the number of vacancies under Rule 10. It was urged by the learned counsel that there is no provision in the Rules for making officiating appointments to substantive vacancies in the service although under Rule 6(3) the Governor in consultation with the High Court can leave unfilled or hold in abeyance any post in the service.

In our view Rule 6(3) referred to by the learned counsel itself impliedly means that though the substantive vacancies might be kept unfilled yet to carry on the work some officiating appointments can be made to that post. Further Rule 26 clearly lays down that a person appointed by direct recruitment under Rule 7(A) (ii) shall be placed on a probation for a period of two years which means that though the appointment is made against a substantive vacancy the incumbent holds the post on probation for a period of two years. Thus it would not be correct to say that the rules contain no provision for making officiating appointments to a substantive vacancy.

22. We are also unable to accept the contention of the petitioners that officiating appointments in the Higher Judicial Service against substantive vacancies from amongst the members of the Rajasthan Judicial Service should be considered as substantive appointments. According to the definition Clause 4(e) a person can be regarded as a "member of the service" only when he is appointed in a substantive capacity to a post in the cadre of the service under the rules. Unless the appointment is made in a substantive capacity a person cannot be regarded as a "member of the service". It is also beyond controversy that a person officiating on a post does not acquire a substantive right to it. See *Parshotam Lal Dhingra Vs. Union of India (UOI)*, and *The State of Bombay Vs. F.A. Abraham*,

Therefore, our conclusion as regards the interpretation of Rule 10 is that though the "period" mentioned in this rule may be future period only though not exceeding three year yet in fixing the number of vacancies all unfilled vacancies after the last recruitment can be taken into account by the Governor. But we should not be understood as saying that the Governor is bound to determine the period as provided in Rule 10. Governor may decide to make appointments to the existing vacancies only and may not have any list prepared in advance for filling the vacancies occurring in future and thus recruitment can be validly made for filling up the existing vacancies only.

23. If the above meaning is given to Rule 10 then it is contended that it would amount to carrying over the vacancies of the previous years in the current year. In support of this contention reliance is placed on *T. Devadasan Vs. The Union of India (UOI)* and *Another*, In our view this case has no application to the facts of the present case. In that case the effect of Government of India Resolution (Ministry of Home Affairs) dated 13-9-50 (as amended by Supplementary Instructions dated 28-1-52 and office Memorandum No. 2-11-55 R. P. S. dated

7-5-55) in regard to the principle of "carrying forward" of unfilled reserved vacancies was to completely ignore the fundamental rights of the citizens constituting the rest of the society and so it was struck down.

In the present case there is neither any question of reservation for any particular class nor of carrying forward the unfilled vacancies to the next period of recruitment. The number of vacancies determined by the Governor in this case according to the respondents have all occurred after the last recruitment to the Rajasthan Higher Judicial Service and the learned counsel for the petitioners was unable to point out the incorrectness of the above position in the course of his arguments although number of grounds were alleged in the rejoinder to challenge it.

24. In their reply the respondents have stated that in compliance with Rule 10 the Governor had determined the number of vacancies as 18. Of these the number of persons to be recruited by promotion as 14 and the number of persons to be appointed by direct recruitment as four and the proposed recruitment was intended to fill up vacancies upto the end of the year 1962 vide letter No. F80 (46) LJ/B/59 dated 6th December 1962 and accordingly we do not find any infirmity in the said determination according to our interpretation of Rule 10 to give notice. We accordingly hold that compliance with Rule 10 was made by the Governor before notice was issued inviting applications for direct recruitment. Further in view of our above interpretation of Rule 10 it is not necessary to answer the objection that the date of the commencement of the period is not mentioned in the order and that defect cannot be supplied by any other evidence.

25. Learned counsel for the petitioners then contended that there could not be 18 vacancies on the date of determination i.e., 8th December 1962 because 9 vacancies were substantively filled up vide No. F 18 (1) (21)/Jud/62 dated 17th November 1962 as shown in schedule II of the rejoinder and it should be presumed that the above appointments were made in accordance with the rules.

26. Learned Deputy Government Advocate had to concede that nine judicial officers were in fact confirmed on 17th November, 1962 to post in Higher Judicial Service though he faintly urged that their confirmation was not made in accordance with the Rules. It is unnecessary for us to examine the validity of the confirmation of 9 judicial officers to Higher Judicial Service on 17th November, 1962 as that matter is not before us and so the fact remains that there were not 18 vacancies on 8th December 1962 when the number of vacancies was determined by the Governor, In fact there were only 9 vacancies on that date and direct recruitment could only be made for two posts according to the proportion laid down in the rules.

27. Lastly, it was contended that even though some of the petitioners and other members of the Rajasthan Judicial Service had been working in officiating capacity on the post of Civil and Additional Sessions Judge for a long period, but their seniority in that post shall be determined by the date of the order of their

appointment in substantive vacancy according to Rule 25. It is pointed out that officers appointed by direct recruitment who are placed in probation for a period of two years under Rule 26 would become senior to many who have already been working in officiating capacity on that post for a number of years. We are of the opinion that unless the appointments to the posts are made and any concrete instance in which the seniority of any judicial officer is prejudicially affected is brought to our notice we do not feel called upon to determine this contention in this petition.

28. There is also no basis for the apprehension of the petitioners that appointment to the proportionate existing vacancies shall be made by direct recruitment only and the remaining vacancies shall not be filled up from the other source as required by the rules. In this connection Respondents Nos. 2 to 4 in paragraphs 17 and 20 of their reply have categorically stated that appointments will be made by the Governor from both sources of recruitment simultaneously on the basis of the lists prepared according to the rules.

In our view there is no substance in this writ petition. All what is required under Article 233 of the Constitution is that appointment of a District Judge as defined in Article 236 should be made by the Governor in consultation with the High Court. The rules provide a method for selection of suitable persons for such posts by the High Court and finally their appointments by the Governor. This in our view fully satisfies the above requirement.

29. Accordingly, we reject the application in regard to all the reliefs sought by the petitioners in their writ petition. But in view of our finding that the number of vacancies on the date of its determination by the Governor was only 9 and not 18, we direct Respondent No. 1 that these vacancies only shall be filled from both the sources in the proportion provided in the rules.

In the circumstances of the case, we make no order as to costs.