

(2008) 05 SC CK 0060

In the Supreme Court Of India

Case No : Civil Appeal No. ... of 2008 (Arising out of Special Leave Petition (Civil) No. 18307 of 2007)

P.S. Gopinathan

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 09-05-2008

Acts Referred:

Constitution of India, 1950 — Article 136, 233, 233(1)

Kerala Higher Judicial Service Rules, 1961 — Rule 1, 2, 5(2), 6

Citation : AIR 2008 SC 2768 : (2008) AIRSCW 4602 : (2008) 3 CLT 174 : (2008) 7 SCALE 564 : (2008) 7 SCC 70 : (2008) 2 SCC(L&S) 225 : (2008) 3 SLJ 268 : (2009) 1 SLR 590 : (2008) 4 Supreme 85

Hon'ble Judges : S. B. Sinha, J;P. P. Naolekar, J

Bench : Division Bench

Advocate : P.S. Patwalia, Jayanth Muthraj and K.V. Mohan, for the Appellant; Parag P. Tripathi, A.A.G., Jawahar Lal Gupta, L.N. Rao, T.L.V. Iyer, Romy Chacko, Arpit Gupta, B.S. Verma, G. Prakash, Vismai Rao and T.G. Narayan Nair, for the Respondent

Final Decision : Allowed

Judgement

P.P. Naolekar, J.—Leave granted.

2. The appellant was directly recruited to the post of Munsiff and was later promoted to the post of Subordinate Judge. Thereafter, the appellant was promoted to the Kerala State Higher Judicial Service, whereas the respondents 3 to 5 were directly recruited to the Higher Judicial Service.

3. The subordinate judiciary in the State of Kerala consisting of District Judges, Chief Judicial Magistrates, Subordinate Judges, Munsiffs, Judicial Magistrates of the First Class, Judicial Magistrates of the Second Class, was functioning in the matter of appointment and promotions as two separate wings, (1) consisting of the Kerala State Higher Judicial Service and the Kerala Civil Judicial Service and (2) the Kerala Criminal Judicial Service. The Higher Judicial Service consisted of

District Judges. The Kerala Civil Judicial Service consisted of Subordinate Judges and Munsiffs, whereas the Kerala Criminal Judicial Service consisted of Chief Judicial Magistrates, Judicial Magistrates of the First Class and Judicial Magistrates of the Second Class. The Civil Judicial Service and the Criminal Judicial Service came into being as a result of the orders issued under G.O.(Ms) 24/73/Home dated 12.2.1973 and with that the subordinate judiciary was also bifurcated for the first time into Civil Wing and Criminal Wing. The Higher Judicial Service all along constituted one separate Service to which after the implementation of the G.O. dated 12.2.1973, only the Civil Judicial Service Officers are eligible to be considered. Thus, there was subordinate Civil Judicial Service and the Criminal Judicial Service. Promotion to the Higher Judicial Service was available from the Kerala Civil Judicial Service only.

4. The Higher Judicial Service was constituted under the Kerala State Higher Judicial Service Rules published on 18.7.1961. It consisted of two categories : Category 1 - Selection Grade District & Sessions Judge and Category 2 : District & Sessions Judge (including Additional District & Sessions Judge). Appointment to Category 2 was to be made by transfer (promotion) from the category of Civil Judicial Service or by direct recruitment from the Bar. The number of posts to be filled up by direct recruitment is 1/3rd of the permanent posts in Categories (1) and (2) taken together. While under the said Rules, a select list of subordinate Judges (Civil category) was prepared on 8.1.1991 and approved by the Administrative Committee of the High Court, was also approved by the Full Court on 11.1.1991. The Government also approved the select list of Subordinate Judges by its order dated 19.11.1991 for appointment as District & Sessions Judges. The appellant was ranked No. 2 in the said list. A letter dated 10.12.1991 was addressed by the Registrar, High Court, to the Commissioner and Secretary to the Government in Home Department, wherein it was stated that the sanction had been accorded for the establishment of three Special Courts at Thiruvananthapuram for the trial of mark list cases in the light of the Supreme Court direction dated 20.8.1991; the Government had also sanctioned three posts of District Judges; as per the Government Order, the Government had approved 11 Sub-Judges for appointment as District Judges in the Kerala State Higher Judicial Service and in order to provide three District Judges in the new Special Courts to be established at Thiruvananthapuram, the actual appointment as District Judges of the following three officers was considered necessary to be made:(i) P.S. Gopinathan; (ii) K.S. Gopinathan Pillai; and (iii) M.V. Viswanathan; and, therefore, the Government orders and notifications appointing the above three officers as a panel of District Judges in the Kerala State Higher Judicial Service may be issued immediately.

5. In place of the Kerala Civil Judicial Service and the Kerala Criminal Judicial Service, a common Service was brought into force by the Kerala Judicial Service Rules, 1991 published in the Gazettee on 31.12.1991 and amendment to the Kerala Higher Judicial Service Rules, 1961 vide G.O.(P) No. 47/92/Home dated 28.2.1992 was given retrospective effect from 1.1.1992, the date of coming into

force of the Kerala Judicial Service Rules. The common Service constituted under the said Rules consisted of the following categories of officers:

Category 1 : Subordinate Judges/Chief Judicial Magistrates Category 2: Munsiffs/Magistrates.

6. After the enactment of the Kerala Judicial Service Rules, 1991, the Governor in exercise of the powers conferred by Clause (1) of Article 233(1) appointed three Sub-Judges, including the appellant, as District & Sessions Judge in the Kerala State Higher Judicial Service on 14.1.1992, without prejudice to the claims of candidates to be recruited from the Bar to satisfy the provisions in Rule 2(b) of the Kerala State Higher Judicial Service Rules, 1961.

7. Before the appointment order of the appellant was issued on 14.1.1992, the new Rules integrating two lower subordinate Services had come into force and the question arose whether the vacancies in the three courts created as per the direction of the Supreme Court would be filled up by temporary appointments and the order of the Governor issued could be treated as appointing the officers temporarily without there being any claim of seniority by the officers who had been appointed to fill up those vacancies. The Administrative Committee of the High Court approved and made the following recommendations among other matters:

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

(2) Even in the case of those appointed from the panel after 1.1.1992, their appointment may be treated as temporary 6 without probationary rights. Their seniority in the category be decided later after a fresh panel is prepared;

(3) Steps be taken to prepare a fresh panel for appointment as District Judges from among Sub Judges/Chief Judicial Magistrates in service on 1.1.1992;

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

The Committee recommended that the case of K.N. Balakrishna Panicker (respondent No. 6), the senior-most Sub-Judge who had been superseded last time be also considered after assessing his judgments. The Full Court approved the recommendations made by the Administrative Committee.

8. From the Official Memorandum issued by the High Court dated 9.9.2005, the reason for taking the decision for posting the appellant on a temporary basis appears to be that the select list was prepared on the basis of the seniority list which had been prepared before the integration of the two Services, i.e. Civil Judicial Service and Criminal Judicial Service. After the integration of the two Services, the select list was prepared and the appointment order was issued on

the said basis, whereas before the appointment order was issued on 14.1.1992, the rules were amended and the two Services were integrated. Therefore, there was a necessity to prepare the fresh seniority list in the light of the integration of the Civil and Criminal Wings of the State Subordinate Judiciary w.e.f. 1.1.1992. Pending preparation of the combined seniority list, a posting order was issued without any probationary rights.

9. On 29.2.1992, the High Court passed the order with regard to the posting of the appellant who had been appointed as a District Judge in the Kerala State Higher Judicial Service and he was posted as an Additional District Judge, Kozhikode and was directed to hand over his charge to the Additional Sub-Judge, Vadakara. The posting of the appellant along with other officers was made temporary without probationary rights and their seniority in the category of the District Judges was to be determined later. By this order, the High Court posted the appellant as Additional District Judge on temporary basis without probationary rights and seniority was left open to be considered on a later date.

10. The appellant joined service on 7.3.1992 as per the posting order. Respondents 3 to 5 were the direct recruits from the Bar to the Higher Judicial Service.

11. On 29.2.1992, Rule 2(b) of the Rules was substituted by providing for the category of Chief Judicial Magistrates also to be a feeder category for appointment to Category (2) of the Kerala State Higher Judicial Service under the Service Rules, which came into effect on 1.1.1992. While so, respondents 3 to 5 were directly appointed as District Judges by the Governor. Respondents 3 and 4 were appointed on 31.3.1992 and they took charge on 2.4.1992, whereas respondent 5 was appointed by order dated 30.5.1992 and he took charge on 1.6.1992.

12. After the introduction of Service Rules, 1991, which came into effect on 1.1.1992, the High Court drew a fresh panel of Sub-Judges and Chief Judicial Magistrates for promotion as District & Sessions Judges from the integrated seniority list of Sub-Judges and Chief Judicial Magistrates. The fresh panel was approved by the Full Court on 21.2.1992.

13. On 15.7.1992, the Governor of Kerala approved the panel of Sub-Judges and Chief Judicial Magistrates for appointment as District & Sessions Judges in the Kerala State Higher Judicial Service, without prejudice to the claim of the candidates to be recruited from the Bar as provided in Rule 2(b) of the Kerala State Higher Judicial Service Rules, 1961. In the said panel, respondent 6 (K.N Balakrishna Panicker) was shown at Sl. No. 1, whereas the appellant was at Sl. No. 2. On the same day, the Governor of Kerala was pleased to appoint the Sub-Judges and Chief Judicial Magistrates at Sl. Nos. 1 to 8 in the panel approved in the Government Order as District & Sessions Judges in the Kerala State Higher Judicial Service without prejudice to the claims of the candidates to be recruited from the Bar. This appointment order indicates respondent 6 at Sl. No. 1 and the

appellant at Sl. No. 2.

14. On 31.7.1992, the High Court passed an order whereunder the appellant who was posted in the Motor Accident Claims Tribunal, Kozhikode (now temporary District Judge) who had been appointed as District & Sessions Judge in the Kerala State Higher Judicial Service as per the Government Order, was allowed to continue in the present post as regular District Judge. This order indicates that the appellant was appointed temporarily as District Judge and by a later appointment order issued by the Governor he was treated as a regular District Judge and was allowed to continue on the same post.

15. On the basis of the office memorandum of High Court dated 29.9.1992, it was proposed to show the seniority of the appellant below the 6th respondent. The appellant made a representation on 28.10.1992 to the High Court claiming that his appointment as District & Sessions Judge should not be treated as a temporary one and to treat him senior to respondents 3 to 6 in the category of District & Sessions Judges. On 16.8.1994, a draft seniority list of Selection Grade District & Sessions Judges was published. The appellant was shown below respondents 3 to 6. While the appellant was shown at Sl. No. 60, respondents 3 to 6 were shown at Sl. Nos. 56, 57, 58 and 59. The appellant again submitted a representation on 25.10.1994 challenging the assignment of seniority to the respondents above the appellant. On 18.1.1995, the High Court issued an order declaring completion of the probation period by the appellant. In the said order, the commencement of the appellant's probation was shown as on 31.7.1992 (the date when the second posting order was issued). As per the representation, the commencement of the probation of the appellant as on 31.7.1992 could not have been shown. The appellant was appointed as District & Sessions Judge as per the order and notification dated 14.1.1992 and joined duty on 7.3.1992 and continued to be in service without any break and, thus, the commencement of the period of probation should have been from that date. The appellant submitted representation to that effect on 17.4.1995. Thereafter, a reminder representation on 7.2.1998 and another representation on 20.5.2000 were made by the appellant. On 18.12.2003, the High Court issued order permitting respondents 3 to 5 as Selection Grade District & Sessions Judges in preference to the appellant. On 8.3.2004, the appellant filed representation challenging the seniority list in the category of District & Sessions Judges in Selection Grade given to the respondents in preference to the appellant. On 12.3.2004, the High Court sent a communication to the appellant stating that his representations for re-fixation of his seniority in the cadre of District & Sessions Judge were under consideration. The appellant's representation for advancing the date of his promotion as Selection Grade District Judge would also be considered. Thereafter on 1.9.2004, the High Court gave permission to respondents 3 to 5 and the appellant to the category of Selection Grade District Judges with retrospective effect from 3.7.2000, 12.7.2000, 12.7.2000 and 12.7.2000 respectively. In the said order, the appellant was shown at Sl. No. 14, whereas respondents 3 to 5 were shown as Sl. Nos. 11, 12 and 13 respectively. The appellant was shown

junior to respondents 3 to 5 in the category of Selection Grade District Judges. Therefore, the appellant again submitted a representation on 15.9.2004. On 2.11.2004, the High Court again permitted respondents 3 to 5 as Super Time Scale District & Sessions Judges w.e.f. 13.10.2004, 14.10.2004 and 28.10.2004 respectively, whereas the appellant was retained as Selection Grade District & Sessions Judge. Respondent 6 had already left the Judicial Department while holding the post of District & Sessions Judge and he was appointed as Railway Claims Tribunal.

16. On 22.5.2005, the appellant filed a writ petition before the High Court of Kerala challenging the draft seniority list dated 16.8.1994, order dated 18.1.1995 (declaration of the probation of the appellant), order dated 18.12.2003 (promotion of respondents 3 to 5 to the post of Selection Grade District & Sessions Judges) and order dated 1.9.2004 [proceedings of the High Court (2nd respondent) permitting respondents 3 to 5 as Super Time Scale District & Sessions Judges]. On 9.9.2005, during pendency of the writ petition, the High Court rejected the appellant's representation for re-fixation of his seniority in the category of District & Sessions Judges. On 13.10.2005, the appellant's representation challenging the draft seniority list was also rejected. The appellant challenged the Office Memorandum dated 13.10.2005 by amendment of the writ petition. On 19.2.2007, the learned Single Judge of the High Court referred the case to be heard by a Bench of two Judges. It would be pertinent to note that in the writ petition the appellant had not challenged the Memorandum dated 15.7.1992 whereby the Governor of Kerala had approved the fresh panel of Sub-Judges and Chief Judicial Magistrates for appointment as District & Sessions Judges, the order of appointment of the appellant from the panel as District & Sessions Judge in the Kerala State Higher Judicial Service by order dated 15.7.1992 or the posting order dated 31.7.1992 whereby the appellant was shown to be a temporary District Judge and was posted as regular District Judge after the issuance of the order of appointment on the post of District Judge by order dated 15.7.1992.

17. The Division Bench of the High Court has taken into consideration various aspects which had arisen for determination of the court, namely, as to which order, i.e. order dated 14.1.1992 or order dated 15.7.1992 shall be taken to be the first appointment order which is relevant for Rule 2(b) of the Kerala Higher Judicial Service Rules; whether it is open to 2nd respondent- High Court to treat the order dated 14.1.1992 passed by the Governor under Article 233 to have given the appellant status of a temporary employee appointed in the Higher Judicial Service and not to treat that period of service as on probation. The High Court further considered the effect of not challenging the orders passed by the Governor on 15.7.1992 and 31.7.1992, by the appellant. Whether the appointment order issued by the Governor under Article 233 can be pronounced as having no legal effect or illegal on account of violation of the rules which provide for the integration of Civil and Criminal Wings and the order of appointment being issued without taking into consideration the integrated service

on the feeder post.

18. The High Court held that the Governor is the appointing authority of the District Judges in the State which shall be done by the Governor in consultation with the High Court. The High Court while issuing the order of posting treated the appellant as temporary and acted entirely bonafide since the amendment including Chief Judicial Magistrates in the feeder category for promotion as District Judges, was not only on the anvil but, in fact, it was published on the same day with retrospective effect from 1.1.1992. Since Rule 6 of the Kerala Higher Judicial Service Rules declares that the seniority will be determined on the first order of appointment, the High Court has committed an error in treating the appellant's appointment as temporary appointment, particularly when there is no indication in the order of the appointing authority, namely, the Governor, that the appointment of the appellant was temporary. However, since the appellant has accepted the posting order treating him to be a temporary employee while joining duty, the subsequent orders issued approving the fresh panel consisting both of Sub-Judges and Chief Judicial Magistrates in purported compliance of the mandate of the Rules as amended, the appointment order of the Governor and thereafter the posting order indicating him to be a temporary District Judge and appointing him as regular employed District Judge have not been challenged. Thus, the High Court was of the view that since the appointment order dated 15.7.1992 issued by the competent authority, namely, the Governor, had not been challenged by the appellant, he cannot challenge the previous order since there can only be one appointment order with reference to which seniority can be ascertained under Rule 6 and the High Court took the appointment order dated 15.7.1992 as the order of appointment of the appellant to the post of District Judge in the Higher Judicial Service and consequently dismissed the writ petition filed by the appellant herein.

19. It is submitted by Shri P.S. Patwalia, learned senior counsel appearing for the appellant that the appellant's seniority has to be counted from the date of his appointment on 14.1.1992 made by the Governor in exercise of the powers under Article 233 in consultation with the High Court. Merely because the rule has been amended with retrospective effect from 1.1.1992 whereby the feeder post to the transfer (appointment) to the category of District & Sessions Judges (including Additional District & Sessions Judges) was made from the category of Subordinate Judges/Chief Judicial Magistrates of the Kerala Judicial Service instead of the category of Subordinate Judges only, it is urged by the learned senior counsel that the post being available prior to the rule being amended, the appellant's transfer (appointment) to the post of District & Sessions Judge could not have been treated as temporary appointment without probationary rights.

20. It is urged by Shri Jawahar Lal Gupta, learned senior counsel appearing for respondent No. 3 that the appellant was although appointed on 14.1.1992 his appointment for all purposes and intent as expressly mentioned in the posting order dated 29.2.1992 had been treated as temporary appointment without

probationary rights which was accepted by the appellant by accepting the fresh appointment order dated 15.7.1992 as permanent appointment on the post of Category (2) District & Sessions Judge and, thus, the appellant cannot now contend that the order dated 14.1.1992 was his appointment on the permanent basis on the cadre post of Category (2) District & Sessions Judge. That apart, it is submitted by the learned senior counsel that the appellant having not challenged the order dated 15.7.1992 or order dated 31.7.1992 issued by the High Court posting him, is not entitled to get the seniority on the basis of the order passed on 14.1.1992.

21. Shri L.N. Rao, learned senior counsel appearing for respondents 4 and 5 has submitted that although the post had accrued when the old rules were in operation, the appointment has to be treated under the old rules but authority can certainly say that the appointment shall not be made under the old rules and can defer the appointment until the new rules came into force.

22. Shri T.L.V. Iyer, learned senior counsel appearing for respondent No. 2 - Kerala High Court has supported the decision taken by the High Court in treating the appointment of the appellant dated 14.1.1992 as temporary appointment.

23. The relevant rules of the Kerala State Higher Judicial Service Rules, 1961, which shall govern the appointment and seniority of Category (2): District & Sessions Judges, read as under:

1. Constitution.- The service shall consist of the following categories, namely:

Category (1) Selection Grade District and Sessions Judge.

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

2. Method of appointment.- (a) Appointment to category (1) shall be made by the High Court by promotion from category (2).

(b) Appointment to category (2) shall be made by transfer from category 1, Subordinate Judges/Chief Judicial Magistrates of the Kerala Judicial Service or by direct recruitment from the Bar, provided that the number of posts in category (2) to be filled up or reserved to be filled up by direct recruitment shall be one-third of the permanent posts in categories (1) and (2) taken together.

(c) Appointment by promotion to category (1) and appointment by transfer to category (2) shall be made on the basis of merit and ability, seniority being considered only where merit and ability are approximately equal.

3. Qualification.- (1)(a) No person appointed to category (2) either by transfer or by direct recruitment shall be eligible for promotion to category (1) unless he is an approved probationer in category (2) on the date of occurrence of the vacancy.

(b) Omitted

(2) A candidate for appointment to category (2) from the Bar shall satisfy, the

following general conditions namely:

xxx xxx xxx 4. Probation.- (a) Every person appointed to category (2) shall, from the date on which he joins duty, be on probation for a period of two years on duty within a continuous period of three years.

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

5. Appointing Authority.- (1) All appointments to category (1) shall be made by the High Court.

(2) All first appointments to category (2) whether by direct recruitment or by transfer, shall be made by Governor in consultation with the High Court.

5A. Postings and Transfers.- All postings and transfers of persons appointed to categories (1) and (2) shall be made by the High Court.

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

xxx xxx xxx

Under Rule 1, the cadre of District & Sessions Judges is in two categories: Category (1) relates to Selection Grade District & Sessions Judges, whereas Category (2) relates to District & Sessions Judges (including Additional District & Sessions Judges). Rule 2(b) provides for appointment by transfer (promotion) to Category (2) i.e. District & Sessions Judges (including Additional District & Sessions Judges). Feeder post from 1.1.1992 shall be Subordinate Judges/Chief Judicial Magistrates of the Kerala Judicial Service or by direct recruitment from the Bar. Under Clause (c) of Rule 2, the eligibility criteria for transfer/promotion to the post of District & Sessions Judge shall be on the basis of merit and ability and seniority shall be taken into consideration only where the merit and ability of the promotee officer are approximately equal. Thus, the promotion to the post of District & Sessions Judge in Category (2) from the post of Subordinate Judge/Chief Judicial Magistrate would be on the basis of merit-cum-seniority. Under Rule 4, every person appointed to Category (2) shall be on probation for a period of two years within the continuous period of his service for three years from the date of his joining duty on the promoted post. By virtue of Sub-rule (2) of Rule 5, the first appointment to Category (2), whether by direct recruitment or by transfer, shall be made by the Governor in consultation with the High Court. Rule 6 on which the emphasis is laid by the appellant is in regard to the seniority of a person appointed either to Category (1) or Category (2), i.e. District & Sessions Judges, says that unless the person appointed is reduced to a lower rank as punishment, his seniority shall be determined with reference to the date of the order of his first appointment to the said category. Therefore, for the purposes of ascertaining the seniority of an officer, the date of the order of his first appointment will have a relevant consideration under the rules.

24. It is an admitted fact that on 14.1.1992 the appellant was appointed on the post of District & Sessions Judge by the Governor in exercise of the power conferred by Clause (1) of Article 233, without prejudice to the claim of candidates to be recruited from the Bar to satisfy the provisions of Rule 2(b) of the Kerala State Higher Judicial Service Rules, 1961. However, as there was an integration of the Civil Judicial Service and Criminal Judicial Service, the matter was referred to the Administrative Committee and the Committee recommended that the entire panel prepared of Sub-Judges (which does not include the Chief Judicial Magistrates) and approved by the Government be annulled except in the case of those already appointed from the panel. The Administrative Committee further recommended that the appointment from the panel after 1.1.1992 shall be treated as temporary without probationary rights and their seniority in the category be decided later after a fresh panel is prepared and the directions were issued for preparation of the fresh panel. This recommendation of the Administration Committee was accepted by the Full Court. The reason for taking this decision was that the select list was prepared on the basis of the seniority list which had been prepared before integration of two Services. After the integration of two Services w.e.f. 1.1.1992, the appointment order was issued by the Governor on 14.1.1992 without taking into consideration the integrated service of the Sub-Judges and the Chief Judicial Magistrates. The appointment order of the appellant was issued on 14.1.1992. In pursuance thereof and the decision taken by the High Court, a posting order was issued on 29.2.1992. The posting order clearly specified that the appellant was being posted as Additional District Judge on temporary basis without probationary rights in the category of District Judges and his seniority in the category of District Judges will be determined on a later date. The appellant took charge of the post on 7.3.1992 without any demur or objection. When the appellant was continuing on the post, respondents 3 to 5 were appointed as District & Sessions Judges in the quota of direct recruits. Later on, a fresh panel for the transfer/promotion was prepared by the High Court which was approved by the Governor and a fresh appointment order issued on 15.7.1992 without prejudice to the claim of the candidates recruited from the Bar. In pursuance of the appointment order issued by the Governor on 15.7.1992, on 31.7.1992 the appellant was posted on the same post where he was serving on the post of Motor Accident Claims Tribunal. The posting order categorized him as 'now temporary District Judge' and he was allowed to continue on the post as a regular District Judge. The posting order treated the appellant as a temporary District Judge till that date and he was treated as a regular District Judge from the date of posting, i.e. 31.7.1992, in pursuance of the order issued on 15.7.1992. All along by posting order dated 29.2.1992 as well as by posting order dated 31.7.1992, the appellant's appointment on the post of District & Sessions Judge has been treated on temporary basis. Yet, the appellant kept silence, accepted the orders and worked on the post as temporarily appointed and posted District & Sessions Judge. It is after lapse of considerable period he made a representation on 28.10.1992 complaining that he was appointed by appointment order dated 14.1.1992 and in

pursuance of his posting orders he had joined the duty on 7.3.1992; thereafter he had been continuously working on the post; later on, direct recruitment was made whereby three District & Sessions Judges were appointed but he was being proposed to be ranked below K.N. Balakrishna Panicker; he cannot be treated as junior to Panicker in the light of the definition of the term 'appointed to service' as occurring under the rules and other provisions governing service and seniority he is entitled to be ranked above Panicker; in view of the vested rights which accrued to him on the basis of his legal entitlement in the light of the inclusion of his name in the select list, the admitted vacancy available and the order of appointment passed by the Governor, his appointment as District & Sessions Judge cannot at all be treated as temporary.

25. The law of equitable estoppel by acquiescence has been clearly stated by Fry, J. in *Wilmott v. Barber* 1880, 15 Ch D 96, 105: 43 LT 95. It has been said therein that the acquiescence which will deprive a man of his legal rights should amount to fraud. A man is not to be deprived of his legal right unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description, are stated thus:

(i) The plaintiff (i.e. the party pleading acquiescence) must have made a mistake as to his legal rights;

(ii) The plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of the mistaken belief;

(iii) The defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed with the right claimed by the plaintiff. If he does not know of it, he is in the same position, as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights;

(iv) The defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights; and

(v) The defendant, the possessor of the legal right must have encouraged the plaintiff in his expenditure of money, or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the court to restrain the possessor of the legal right from exercising it, but nothing short of this will do. These principles were followed and applied in many cases in India.

26. The appellant was appointed by the Governor by transfer/ appointment order issued on 14.1.1992 and his seniority was to be considered as provided under Rule 6 of the Rules which says that the seniority of a person appointed shall be determined with reference to the date of the order of his first appointment to the category. Thus, apparently when the order dated 14.1.1992 was issued by the

Governor, it would be the first appointment for the determination of the seniority of the appellant. There is nothing in the order dated 14.1.1992 on the basis of which it can be treated to be an appointment on temporary basis made by the Governor. It is apparent from the posting order dated 29.2.1992 that the High Court, because of the integration of two Services w.e.f. 1.1.1992 prior to the issuance of the order of appointment on 14.1.1992, has treated the order of appointment as a temporary one and, therefore, the posting order specifically mentioned that the appellant's appointment would be temporary without there being any probationary rights. Thereafter on 21.2.1992, a fresh panel was prepared by the High Court for the purposes of transfer/promotion to Category (2): District & Sessions Judge and the proposal for promotion of the officers in that list has been accepted by the Governor by issuance of the order of appointment including that of the appellant on 15.7.1992. On 31.7.1992, the appellant's posting order was issued. Posting order clearly indicated that the appellant was working as a temporary District Judge and by virtue of the order issued on 15.7.1992 he shall be treated as permanent District Judge. While issuing the posting order of the appellant in pursuance of the order dated 14.1.1992, the High Court has committed a mistake in treating it to be an order of temporary appointment of the appellant when there was nothing to this effect in the appointment order. When the posting order was issued on 29.2.1992, the appellant was well aware of the order of his appointment dated 14.1.1992 whereby he was appointed on permanent basis on the post of District & Sessions Judge, yet when the posting order was issued treating him to be a temporary appointee which was inconsistent with the order dated 14.1.1992, the appellant did not raise any objection and readily accepting the posting order joined the service on 7.3.1992 as temporary Additional District Judge. The posting order dated 29.2.1992 specifically mentioned that he has been posted as a temporary Additional District Judge without any probationary rights and thus the appellant was well aware of the mistaken belief of the High Court in appointing and posting him as a temporary employee. As there was no objection and protest by the appellant, a fresh panel prepared, recommended and fresh order of appointment of appellant was issued by the Governor. Again when the fresh appointment order was issued on 15.7.1992 by the Governor and the appellant was posted on 31.7.1992 treating his first appointment order as a temporary appointment, no protest was made by him. In view of the fact that the Governor issued an order dated 15.7.1992 even when order of 14.1.1992 was in existence, it is apparent that the appointing authority has also treated the first order dated 14.1.1992 as an order of appointment on temporary basis. It is, therefore, apparent from the second appointment order that the appointing authority as well as the posting authority have all along treated the appellant as a temporary District Judge, but the appellant did not object on both occasions when he joined on 7.3.1992 and on 31.7.1992 of he being treated as temporary District Judge. The act and action of the appellant in accepting his appointment as temporary one amounts to his assent to the temporary appointment and the appellant throughout till he raised an objection on 29.10.1992 has slept on his right of being appointed

permanently on the post of District & Sessions Judge. By his conduct at the time of the issuance of the order by the High Court on 29.2.1992 and thereafter issuance of the second appointment order on 15.7.1992 with full knowledge of his own right and the act of the High Court which infringes it, led the High Court to believe that he has waived or abandoned his right. Lord Campbell in *Cairncross v. Lorrimer*, 3 LT 130 held that "generally speaking if a party having an interest to prevent an act being done had full notice of its being done, and acquiesce it, so as to induce a reasonable belief that he consents to it and the position of the others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license."

27. The aforesaid facts clearly make out an acquiescence of the appellant of accepting order dated 14.1.1992 being treated as temporary appointment order on the post of District & Sessions Judge and he cannot now be permitted to change his position and claim the permanent appointment from 14.1.1992 to claim seniority on the post. Besides this, the High Court has rightly held that in the absence of the challenge to the second appointment order dated 15.7.1992 from the fresh panel dated 21.2.1992, that order will stand, though later in time, and has to be given effect to as an order of appointing the appellant on permanent basis under Rule 6 of the Rules.

28. For the aforesaid reasons, the appeal is dismissed. However, there shall be no order as to costs.

S.B. Sinha, J.—Although I respectfully agree with the opinion of my learned brother Naolekar, J., I would like to add a few words.

2. Respondents No. 3 to 5 herein were granted selection grade much prior to the appellant. They have also been granted super-selection grade. They have been thus placed in Category - I of the services. For all intent and purport they were promoted much prior to the appellant herein.

3. Such orders of promotion in terms of the Rules were granted on the basis of merit and ability. Seniority was considered to be relevant only where merit and ability were approximately equal. The inter se seniority, therefore, does not remain the sole criteria.

4. The case of the appellant for the purpose of grant of selection grade as also super-time scale must have been considered alongwith the said respondents. They must have been found to be more meritorious. In that view of the matter, it is, in our opinion, not a fit case where we should even exercise our jurisdiction under Article 136 of the Constitution of India.

5. No doubt the Governor is the appointing authority of the District Judges in the State. However, the same in terms of the constitutional provisions, was required to be done in consultation with the High Court. The High Court keeping in view the amendments made in the Rule treated the appointment of the appellant as

temporary. Apart from the fact that the appellant accepted his posting orders without any demur in that capacity, his subsequent order of appointment dated 15th July, 1992 issued by the Governor had not been challenged by the appellant. Once he chose to join the mainstream on the basis of option given to him, he cannot turn back and challenge the conditions. He could have opted not to join at all but he did not do so. Now it does not lie in his mouth to clamour regarding the cut-off date or for that matter any other condition. The High Court, therefore, in our opinion, rightly held that the appellant is estopped and precluded from questioning the said order dated 14th January, 1992. The application of principles of estoppel, waiver and acquiescence has been considered by us in many cases, one of them being G. Sarana Vs. University of Lucknow and Others, stating:

He seems to have voluntarily appeared before the Committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the Committee.

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