
(2013) 07 GUJ CK 0048
In the Gujarat High Court

Case No : Letters Patent Appeal No. 794 of 2013

Y.P. Kumpavat and Others

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 03-07-2013

Acts Referred:

Citation : (2014) LabIC 474

Hon'ble Judges : Bhaskar Bhattacharya, C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : Mukul Sinha, K.B. Pujara, Deep D. Vyas and J.J. Bhatt, for the Appellant; P.K. Jani, Ms. Shruti Pathak, Ms. Vachha Desai, Parth Bhatt, Vandan Baxi, AGP, G.M. Joshi and Mehul S. Shah, for the Respondent

Judgement

J.B. Pardiwala, J.—Since the subject matter of all these appeals is the same, and the challenge is also to a common judgment and order passed by the learned single Judge of this Court, those were heard analogously and are being disposed of by this common judgment and order. All the four appeals are at the instance of unsuccessful petitioners of the respective Special Civil Applications referred to above, and are directed against the judgment and order dated 10th June, 2013, passed by the learned single Judge of this Court, by which His Lordship rejected all the writ-applications. The facts shortly stated may be summarized as under:--

LPA No. 794 of 2013: The appellants are all employees serving as Assistants (Junior Clerks) on the establishment of the Metropolitan Court at Ahmedabad, except the appellant Nos. 33 and 34, who were appointed as Stenographers. It is the case of the appellants that although their appointments were under the Recruitment Rules of 1957, after undergoing due selection process against regular vacant and sanctioned posts, they are being termed as "ad hoc/temporary employees". The appellants, by filing a writ-application, being Special Civil Application No. 8443 of 2012, challenged the recruitment of English and Gujarati Stenographers (Grade I and II) and Assistants (Junior Clerks), pursuant to the advertisement bearing No. RC-1434 of 2011 dated 21st February, 2012,

which was notified by the High Court of Gujarat on its website. It is their case that their names were called from the Employment Exchange, according to the provisions of Rule 10 of the Recruitment Rules of 1957; they were all subjected to the typing test and each of the appellants had passed the required tests of minimum 40 words per minute in English and 25 words per minute in Gujarati. So far as the Stenographers are concerned, they were asked to undergo test of shorthand also. All the appellants had successfully passed the requisite tests, which were conducted by the Advisory Committee formed under the Recruitment Rules of 1957. It is also their case that they were thereafter, interviewed for selection by the Advisory Committee consisting of the then Chief Metropolitan Magistrate, Additional Metropolitan Magistrate and senior-most Metropolitan Magistrate. At the relevant point of time, around 1500 to 2,000 candidates were called and subjected to various tests and oral interviews by the Advisory Committee and the appellants were thereafter appointed against the regular vacancies. It is their case that after having completed three years of service, they expected to be continued in service as permanent employees, but they were taken by surprise when they learnt that the High Court was conducting a general recruitment under the advertisement referred to above. According to the advertisement, recruitment was to be made to ten posts of Gujarati Stenographers Grade II and 62 posts of Assistants (Junior Clerks). In such circumstances, they were left with no other option but to file a writ-application praying for an appropriate writ, order or direction on the respondents to treat them as regularly appointed employees on the respective posts with effect from their date of joining the service. They also prayed for an appropriate direction on the respondents to confirm them on the respective posts and place them in a regular pay-scale with all consequential benefits. The appellants also thought fit to pray for an appropriate writ declaring that the fresh recruitment initiated pursuant to the advertisement referred to above was *dehors* the Rules of 1957 and was without any sanction of law.

LPA No. 809 of 2013: The appellants are all employees serving as Assistants (Junior Clerks) on ad hoc basis on the establishment of the District Court at Valsad. It is the case of the appellants that they had applied for the posts of Peon and Assistants (Junior Clerks), pursuant to the advertisement issued by the Advisory Committee of the District Court, dated 7th July, 2003. However, the recruitment process for the posts of Assistants (Junior Clerks) was kept in abeyance and they were all called for the interview for the posts of Peons (Class IV). The appellants were duly selected by the Advisory Committee comprising of the then District Judge, Assistant Judge and Civil Judge (Senior Division), according to the Recruitment Rules of 1957, and they were appointed by the District Judge vide orders dated 19-1-2005, 16-2-2005, 14-3-2005 and 21-3-2005 respectively on the Class IV posts of Peon/Watchmen/Watermen/Civil Jail Warden. It is the case of the appellants that their appointments were stated to be purely temporary and on ad hoc basis, and their services were liable to be terminated at any time without any notice, although the appellants were selected

in the regular recruitment process. It is also their case that thereafter, the District Judge sought permission of the High Court for their appointment on the Class III post of Assistants (Junior Clerks) and such permission was granted by the High Court vide its order dated 11th March, 2005, and accordingly, the appellants were appointed as Assistants (Junior Clerks), vide orders dated 21.3.2005 and 17.7.2006. It is their case that since then they are discharging their duties as such very sincerely and diligently, Their appointments were stated to be purely temporary and on ad hoc basis and were liable to be terminated at any time without notice, and for a period of one year or till the regular recruitment took place, whichever was earlier. It is their case that since the time the appellants' appointments were made as referred to above, the process of regular recruitment for the post of Assistants (Junior Clerks) was not undertaken, until the High Court decided to issue an advertisement dated 15th February, 2012 to fill-up such posts by way of centralized recruitment. In such circumstances, the appellants had no opportunity for being selected for the said post on regular basis. It is also their case that they were left with no other option but to file writ-application, being SCA No. 5931 of 2012, and prayed for being treated as regular appointees on the post of Assistants (Junior Clerks) and also prayed for being regularized on the said post, as otherwise also 25% of the posts are required to be filled up by way of promotion from Class IV in accordance with the Resolution dated 26th July, 2011 issued by the State Government, for implementation of the recommendations of the First National Judicial Pay Commission for non-judicial staffs of the subordinate Courts of the State. The appellants also challenged the advertisement dated 15th February, 2012 issued by the High Court, on various grounds.

LPA No. 802 of 2013: The appellants are Class IV employees serving in the Courts in the District of Porbandar. Their case is that they were appointed at the relevant point of time by the Advisory Committee after due selection process in terms of the Recruitment Rules of 1957. According to them, although they were to be treated as regular employees, they were considered as appointees on ad hoc and temporary basis. They also had no other option, but to challenge the legality and validity of the advertisement and the decision of the High Court to fill up the posts through the Centralized Recruitment Cell constituted by the High Court.

LPA No. 810 of 2013: The appellants are all employees serving as ad hoc Sweepers/Hamals in the Courts in the District of Junagadh. It is their case that they were all appointed pursuant to an advertisement, which was issued by the Advisory Committee of the District Court, Junagadh, in terms of the Recruitment Rules, 1957, against clear vacancies which were available at the relevant point of time in the cadre of Class IV. However, they were all treated as ad hoc and temporary employees. It is also their case that although 40 vacancies on the post of Peon in the District Court, Junagadh were available and interview calls were issued to several persons, but for the reasons best known to the authorities, they were not interviewed and no preference was given to them

despite the fact that some of the appellants are in service since the year 1990. They were also left with no other option but to challenge the decision of the High Court to undertake the recruitment through the Centralized Recruitment Cell.

2. Thus, from the facts noted aforementioned, it appears that the case of the appellants is plain and clear. According to them, even if it is believed that their appointment was on ad hoc and temporary basis, they should not be replaced by another set of illegally appointed persons. The basis of this stance of the appellants appears to be the alleged noncompliance of the executive instructions as contained in the Government of Bombay Resolution dated 26th December, 1957, which lays down the procedure for recruitment on non-judicial posts in the subordinate courts. According to the appellants, the decision of the High Court to constitute a Centralized Recruitment Cell and undertake the recruitment process for appointment to Class in and Class IV posts was not in accordance with law, as the Government of Bombay Resolution dated 26th December, 1957 does not provide for the same and there has been no amendment in the Rules so as to provide for Centralized Recruitment Cell.

3. It appears from the materials on record that the learned single Judge thought fit to reject all the writ-applications, mainly on the following grounds:--

(i) Since the appellants participated in the selection process without any objection, they cannot thereafter turn around and challenge the centralized selection undertaken by the High Court in exercise of powers under Article 235 of the Constitution of India;

(ii) The Rules of 1957, which are in the nature of executive instructions issued in exercise of the power under Article 162 of the Constitution of India, have not been replaced or substituted by the High Court;

(iii) The centralized selection process for recruitment of the staff in the subordinate Courts undertaken by the High Court was not dehors the Rules of 1957;

(iv) The High Court's decision to have a centralized selection process through a Centralized Recruitment Cell was with a definite object to save time and expense and to reduce the burden of the judicial officers of the cumbersome process of evaluating large number of candidates for recruitment at the district level;

(v) The Principal District Judge retains the power for appointment on the basis of the selection undertaken;

(vi) The High Court has not framed any statutory Rules for recruitment to the posts of Class III and Class IV cadres in the subordinate courts in exercise of powers under Article 235 of the Constitution. However, if the High Court decided to exercise its controlling power under Article 235 of the Constitution of India with a definite object in furtherance of the Recruitment Rules of 1957, then in such circumstances, it could not be said that the High Court framed Rules independent of and contrary to the Recruitment Rules of 1957.

4. Feeling dissatisfied with the judgment and order passed by the learned single Judge, the appellants have come up with these appeals.

5. Submissions on behalf of the appellants in LPA No. 794/13:

5.1 Dr. Sinha, the learned counsel appearing for the appellants vehemently submitted that the learned single Judge committed a serious error in holding that the control vested with the High Court under Article 235 over the District Courts and Courts subordinate thereto, is inclusive of other matters provided therein and such control would include the power of the High Court to ensure that the judicial officers serving in the subordinate courts may not be burdened with non-judicial work like recruitment to Class III and Class IV posts. According to Dr. Sinha, the learned single Judge is not justified in taking the view that with a view to achieving such object, the High Court is empowered to take administrative decisions in exercise of powers under Article 235 of the Constitution of India. Dr. Sinha would contend that the power conferred under Article 235 on the High Court is limited to the extent of the posting and promotion and grant of leave to all such persons belonging to the judicial services of the State and holding any post inferior to the post of the District Judge. According to Dr. Sinha, Article 235 of the Constitution of India does not confer any power upon the High Court, either to make rules of recruitment for the subordinate staff in the subordinate courts or to undertake the exercise of recruiting such staff.

5.2 Dr. Sinha would also contend that the learned single Judge having taken note of the fact that the recruitment of the subordinate staffs has to be through the Advisory Committee consisting of the District Judge, the Assistant Judge and the Civil Judge (Senior Division), as provided by the Government of Bombay, Home Department Resolution dated 26th December, 12957, which was adopted by the State of Gujarat after bifurcation in the year 1960, was not justified in taking the view that the High Court on its administrative side has the powers to constitute a Centralized Recruitment Cell and make recruitment of the eligible candidates for the Class III and Class IV posts.

5.3 Dr. Sinha, relying on the decision of the Supreme Court in the case of B.S. Yadav and Others Vs. State of Haryana and Others, submitted that Article 235 of the Constitution of India does not confer on the High Court the power to make rules relating to the conditions of service of its judicial officers and ministerial staff attached to the District Courts and the Courts subordinate thereto.

5.4 Dr. Sinha, relying on the decision of the Supreme Court in the case of H.C. Puttaswamy and others Vs. The Hon"ble Chief Justice of Karnataka High Court, Bangalore and others, submitted that the High Court could not have undertaken the exercise of recruitment of the staff to Class III and Class IV posts by a centralized recruitment process.

5.5 Dr. Sinha also very vociferously submitted that his clients were appointed at the relevant point of time strictly in accordance with the Rules of 1957, and if that be so, then their appointments cannot be treated as irregular or illegal.

According to Dr. Sinha, the Advisory Committee of the District had called for the names of the eligible candidates from the Employment Exchange and his clients were subjected to various tests including the typing tests and were also subjected to oral interview and thereafter they were issued letters of appointment. In such circumstances, even though at the relevant point of time in the orders of appointment if it was stated that the appointment was ad hoc or temporary, that by itself will not make the appointment as ad hoc.

5.6 Dr. Sinha also submitted that his clients cannot be replaced by another set of employees whose appointments are dehors the Rules and according to him, it is a settled law that one batch of ad hoc employees cannot be replaced by another batch of illegally appointed ad hoc employees. Dr. Sinha very strenuously urged before us that Article 235 of the Constitution of India, which provides for control of the High Court over the subordinate judiciary does not include the power to issue executive order or to frame Rules for recruitment to non-judicial posts on the establishment of the subordinate courts. In such circumstances, according to Dr. Sinha, the High Court has no power to substitute or add anything to the Rules of recruitment provided under the Resolution of 1957 issued by the then State of Bombay. Lastly Dr. Sinha submitted that the fact that his clients participated in the recruitment process undertaken by the High Court through its Centralized Recruitment Cell by itself is no ground or reason to refuse the relief prayed for in the writ-application. According to Dr. Sinha, if the recruitment itself could be termed as ultra vires then in such circumstances this ground is hardly tenable in law. According to Dr. Sinha, the reliance placed by the learned single Judge on the decision of the Supreme Court in the case of Ramesh Chandra Shah and Others Vs. Anil Joshi and Others, was absolutely misplaced. In such circumstances, Dr. Sinha prayed that the judgment and order of the learned single Judge deserves to be set aside and the relief as prayed for in the writ-application may be granted.

6. Submissions on behalf of the appellants in LPA No. 809/13:

6.1 Mr. K.B. Pujara, the learned Senior Counsel appearing for the appellants practically adopted all the submissions canvassed by Dr. Sinha. However, in addition, Mr. Pujara brought to our notice that so far as his clients are concerned, they stand on a different footing compared to the other appellants. According to Mr. Pujara, to which there is no dispute, his clients were appointed to the posts of Class IV pursuant to the advertisement dated 7th July, 2003, issued by the then District Judge, Valsad. In response to the advertisement dated 7th July, 2003, 60,000 odd applications were received and a regular recruitment process was undertaken by the Advisory Committee at the relevant point of time. His clients were appointed by the District Judge vide orders dated 19.1.2005, 16.2.2005, 14.3.2005 and 21.3.2005 on the Class IV posts of Peon/Watchmen/Watermen/Civil Jail Warden. Mr. Pujara submitted that thereafter the District Judge sought permission of the High Court for appointment of his clients on the Class III posts of Assistants (Junior Clerks), and such permission was granted by the High Court

vide it's order dated 11th March, 2005, and accordingly, his clients were appointed as Assistants (Junior Clerks) vide orders dated 21st March, 2005 and 17th July, 2006. According to Mr. Pujara, since then his clients are discharging their duties as Assistants (Junior Clerks). Mr. Pujara submitted that in light of the fresh recruitment undertaken by the High Court, his clients will now be reverted to their original post of Class IV. In such circumstances, according to Mr. Pujara, his clients were compelled to file petitions with a prayer to treat them as regularly appointed on the post of Assistants (Junior Clerks) and also prayed for being regularized on the said posts by way of promotion in accordance with the Resolution dated 26th July, 2011, issued by the State Government for implementation of recommendations of the First National Judicial Pay Commission for non-judicial staff of the subordinate Courts of the State, which provides that 25% of the entry level clerical posts shall be reserved in favour of Class IV employees, who possess the requisite qualification, in the ratio of 1:2, for process servers and other Class IV employees.

6.2 Mr. Pujara submitted that the learned single Judge has not considered this aspect at all and only dealt with the challenge to the legality and validity of the advertisement dated 15th February, 2012. Mr. Pujara submitted that although the process for regular recruitment on the post of Assistant (Junior Clerk) is required to be made annually in August as provided in the Government Resolution dated 26th December, 1957, the same could not be undertaken since the year 2004, and in such circumstances, his clients were deprived of the opportunity of being promoted to the Class III posts. Mr. Pujara in support of his submission placed strong reliance on the decision of the Supreme Court in the case of Pradip Gogoi and Others Vs. State of Assam and Others,

7. Submissions on behalf of the appellants in LPA Nos. 810/13 and 802/13:

7.1 Mr. J.J. Bhatt, the learned counsel appearing for the appellants of LPA No. 810/13 and Mr. Deep D. Vyas, the learned counsel appearing for the appellants of LPA No. 802/13 adopted the submissions of Dr. Sinha. However, at this stage we may state that Mr. Bhatt, the learned counsel appearing for the appellants of LPA No. 810/13 submitted that although a Full Bench of this High Court in the case of R.M. Gajjar Vs. State of Gujarat and Others, has taken the view that the control vested in the High Court under Article 235 of the Constitution is exercisable not only over the members of the judicial service of the State as defined in Article 236(b), but the ministerial officers and servants on the establishment of the subordinate courts are also ultimately subjected to such control, would not save the situation for the High Court in the present case. According to Mr. Bhatt, this proposition of law would hold good only in the disciplinary matter so far as the ministerial officers and servants on the establishment of the subordinate courts is concerned. This proposition of law, as explained by the Full Bench should not be extended in matters of appointment and therefore, according to Mr. Bhatt, the Full Bench decision of this High Court should not come in the way of his clients in seeking the relief.

7.2 One additional aspect, which Mr. Bhatt highlighted was that none of his clients had applied pursuant to the advertisement dated 15th February, 2012 issued by the High Court and therefore, the defence of the High Court that having participated in the recruitment process a candidate cannot turn around and challenge the same, would not be applicable so far as his clients are concerned.

8. Submissions on behalf of the High Court:

8.1 Mr. G.M. Joshi, the learned Standing Counsel for the High Court of Gujarat vehemently opposed the appeals and submitted that no error, not to speak of any error of law, could be said to have been committed by the learned single Judge in passing the judgment impugned. According to Mr. Joshi, the appellants were appointed on ad hoc basis and that too, without any regular recruitment process. Mr. Joshi submitted that even if it is believed that the names of the candidates were called for by the Advisory Committee from the Employment Exchange and thereafter, the appellants were interviewed before selection, will not change the nature of the appointment as the appointment would still be termed as not in accordance with the Rules of 1957.

8.2 Mr. Joshi invited our attention to Rule No. 10 of the 1957 Rules, which provides that additions to each part of the list should be made annually in the month of August, and the number of candidates to be enlisted should be advertised in the local Newspaper of wide publicity, and published in the various offices of the Departments in the manner prescribed in paragraph 5 of the Government Resolution, Finance Department No. 5011 dated 26th September, 1928. Mr. Joshi submitted that in addition to this, the Advisory Committee shall also call for the lists of eligible candidates from the Employment Exchange office of the respective Division and the Director of Social Welfare, Gujarat State, Ahmedabad. According to Mr. Joshi, except in the case of the appellants of LPA No. 809/13, no such advertisement was issued in the local newspaper, and merely the names of the candidates were called from the Employment Exchange. Thus, according to Mr. Joshi, such a recruitment could not be termed as a regular recruitment, and therefore, the appellants have no right to hold the posts.

8.3 Mr. Joshi submitted that there has been no departure from the Rules of 1957, and it could not be said that the High Court has replaced or substituted the Rules of 1957 with its own set of rules. According to Mr. Joshi, although the Rules of 1957 has empowered the Advisory Committee consisting of the District Judge, the Assistant Judge and the Civil Judge (Senior Division) to make recruitment to class III and class IV posts in the subordinate judicial services, the High Court in exercise of its power under Article 235 of the Constitution can always adopt a procedure of having centralized recruitment process with the avowed object of saving precious time of the judicial officers and with a view to seeing that the judicial officers are not kept engaged in such administrative work at the expense of judicial work, more particularly when there are large number of litigations pending in different courts, which are more than a decade old.

8.4 Relying on the decision of the Supreme Court in the case of *The State of West Bengal Vs. Nripendra Nath Bagchi*, Mr. Joshi submitted that the word "control" although not defined in the Constitution at all, should not be given a restricted meaning and confine the same only to disciplinary matters. Drawing an analogy from Articles 233 and 235 of the Constitution of India, Mr. Joshi submitted that in the case of the District Judges, the appointments of persons to be and posting and promotion are to be made by the Governor but the control over the District Judge is of the High Court. Mr. Joshi submitted that it is true that the High Court, in exercise of its power under Article 235 of the Constitution of India, cannot frame Rules for appointment and such rules are to be framed by the State Government in exercise of powers under Article 309 of the Constitution of India, or in the absence of such rules, on the basis of the executive instructions under Article 162 of the Constitution of India, the High Court being the sole custodian of the District Court and the Courts subordinate to it, will be the best judge to recommend to the State Government as regards the nature of the Rules. Such rules are always framed by the Government in consultation with the High Court. In absence of such consultation, the Government will have no idea as to what type of rules would suit best so far as administration of the Courts in the State is concerned. In such circumstances, according to Mr. Joshi, the High Court definitely has the power to say that the recruitment to Class III and Class IV posts in the subordinate judicial services should be through a Centralised Recruitment Cell consisting of an Advisory Committee of two High Court Judges and Registrar (Recruitment) or any other judicial officer not below the rank of the Additional District Judge. Mr. Joshi submitted that ultimately, the order of appointment will be issued by the Principal Judicial Officer of the District on the basis of the recommendations made by the Committee and therefore, it could not be said that the Rules of 1957, which provides for the procedure has been given a go by. In such circumstances, Mr. Joshi submitted that there being no merit in these appeals, the same deserve to be dismissed.

9. Mr. Mehul S. Shah, the learned Standing Counsel for the High Court appeared in LPA No. 809/13. Mr. Shah conceded to the fact that the appellants of LPA No. 809/13 were appointed to Class IV posts by a regular recruitment process undertaken in terms of the Rules of 1957. He submitted that there is no problem so far as their appointments to the Class IV posts is concerned, but they were promoted to Class III posts only because of some administrative exigency and without undergoing any regular recruitment process. Mr. Shah submitted that it may be true that the appellants of LPA No. 809/13 are serving on Class III post as Assistants (Junior Clerks) past almost seven years, but that fact by itself is no ground to protect their service and they deserve to be reverted to their original post of Class IV. Mr. Shah however, very fairly submitted that so far as the aspect of promotion to the extent of 25% from Class IV to Class III as recommended by the Shetty Pay Commission is concerned, it is for the High Court to take an appropriate decision in that regard and till this date, no decision has been taken so far as the aspect of promotion is concerned.

10. Submissions on behalf of the State Government.

10.1 Mr. P.K. Jani, the learned Government Pleader appearing for the State Government vehemently opposed the appeals and contended that a candidate should not be concerned as to who should be his recruiting authority. Mr. Jani submitted that the Government Resolution of the year 1957, issued by the Home Department of the then State of Bombay lays down the guidelines so far as the recruitment of candidates for Classes III and IV services in the subordinate judicial services is concerned. Mr. Jani submitted that they are not rules framed u/s 309 of the Constitution of India, but they are in the nature of executive instructions or guidelines issued by the State Government at the relevant point of time in exercise of powers under Article 162 of the Constitution of India. Mr. Jani submitted that although in the Government Resolution of 1957, it has been laid down that an Advisory Committee should be formed in every district to assist the District Judges in making appointment in Class III and Class IV posts in the judicial departments and such Advisory Committee shall consist of the District Judge as the Chairman, Assistant Judge and the Civil Judge (Senior Division), the High Court, who is the sole custodian of the subordinate Courts, is definitely empowered by virtue of Article 235 of the Constitution of India to take a decision that the appointments to Class III and Class IV services in the judicial departments shall be through a Centralized Recruitment Cell monitored by the High Court: According to Mr. Jani, in such type of administrative decisions, the Government has actually no role to play for the simple reason that the High Court as the sole custodian of the subordinate courts would be the best authority to know how to recruit candidates to Class III and Class IV services according to the requirements for the smooth administration of the subordinate judiciary. Mr. Jani submitted that the State Government has no objection to the manner, method and the mode adopted by the High Court so far as the recruitment to Class III and Class IV services in the judicial department is concerned. Mr. Jani also submitted that it is not a case where the High Court in exercise of powers under Article 235 of the Constitution has changed the conditions of service which the High Court otherwise has no power to do so. In the present case, according to Mr. Jani, the High Court has merely provided a mechanism of recruitment with the sole object of saving the judicial time of the judicial officers working in the subordinate courts.

10.2 Mr. Jani also submitted, relying on the decision of the Supreme Court in the case of *Vijendra Kumar Verma Vs. Public Service Commission, Uttarakhand and Others*, that the appellants having participated in the recruitment process undertaken by the Centralized Recruitment Cell set up by the High Court, cannot now turn around and submit that the procedure adopted by the High Court was illegal and contrary to the guidelines as laid down in the Government Resolution of 1957.

10.3 Mr. Jani also submitted that the State Government, vide Government Resolution dated 26th July, 2011, has accepted the Shetty Pay Commission

recommendations for the non-judicial staff of the subordinate courts of the State. According to Mr. Jani, one of the recommendations by the Shetty Pay Commission is with respect to setting-up of a Recruitment Cell. It has been recommended that there should be a Recruitment Cell established in each District Court and in the City Civil Court, or in other cities for the purpose of collecting information continuously as to the vacancies arising upon retirement or promotion or resignation of the staff. Such a cell will assist the selection committee and process the application received for the posts and shortlist them according to the guidelines of the selection committee. To such a recommendation, the Government has communicated to the High Court that it is for the High Court to take an appropriate decision in such matters as it is understood that there will be no additional financial burden with the adoption of such a system. In short, the sum and substance of Mr. Jani's submission is that it is only when any decision of the High Court in matters relating to the administration of the subordinate judiciary involves additional financial burden on the State Government, then in such circumstances the State Government should be consulted. According to Mr. Jani, in the present case, the High Court could have asked the State Government to amend the executive, instructions as contained in its Government Resolution dated 26th December, 1957, but instead thought fit to issue or frame ancillary or procedural rules laying down the procedure for recruitment to Classes III and IV services in exercise of the powers under Article 235 of the Constitution of India. According to Mr. Jani, the Government has no say in such type of decisions.

Thus, Mr. Jani would submit that there being no merit in these appeals, the same may be dismissed.

11. Having heard the learned counsel for the respective parties and having gone through the materials on record, in our opinion, the following questions fall for our consideration in these appeals.

(i) Whether the High Court in exercise of its power under Article 235 of the Constitution of India can control the method, manner and mode of recruitment of candidates to Class III and Class IV services in the District Courts and the Courts subordinate thereto, despite the fact that the power to make rules as to the recruitment and conditions of service of the employees of the subordinate courts vests in the State Government, in the absence of which the Governor may frame rules under Article 309 and in absence of both, administrative or executive instructions can be issued under Article 162 of the Constitution of India?

(ii) Whether the control vested in the High Court under Article 235 of the Constitution is exercisable only over the members of the judicial service of the State as defined in Article 236(b) of the Constitution of India, or whether the ministerial officers and servants on the establishment of the subordinate courts are also ultimately subject to such control?

(iii) If the answer to the second question is in the affirmative, then whether such

control over the ministerial officers and servants is only to the extent of disciplinary matters or even matters relating to the method and manner of recruitment and appointment to the Class III and Class IV posts in the District Courts and the Courts subordinate thereto?

(iv) Whether the policy decision of the High Court to have a Centralized Recruitment Cell for the purpose of undertaking the centralized selection process for recruitment of candidates to Class III and IV services in the respective District Courts could be said to be in any manner illegal or in violation of the executive instructions as contained in the Government of Bombay, Home Department Resolution dated 26th December, 1957, providing the procedure for the recruitment to Class III and IV services in the subordinate judicial services?

(v) Was the High Court obliged in law before formulating a policy to have a centralized recruitment process, to recommend the Government for making necessary amendments in the executive instructions as contained in the Home Department Resolution of the then State of Bombay, dated 26th December, 1957?

(vi) Whether the appellants have any indefeasible right of remaining on the posts, more particularly when their initial appointments were ad hoc and on temporary basis?

(vii) Whether the appellants of LPA. No. 809/13 are entitled to claim promotion from Classes IV to Class III on the basis of the reservation to the extent of 25% as recommended by the Shetty Pay Commission and as provided in the Government Resolution dated 2nd September, 2011?

12. Before adverting to the questions framed aforementioned, we should look into the Rules for recruitment of candidates for Classes III and IV services in the District as contained in the Government of Bombay, Home Department Resolution dated 26th December, 1957. We reproduce the same as under:--

ADVISORY COMMITTEE FORMATION OF ADVISORY COMMITTEES FOR RECRUITMENT TO CLASS III AND CLASS IV SERVICES

GOVERNMENT OF BOMBAY HOME DEPARTMENT RESOLUTION NO. MIS. 1055/62546-III, SACHIVALAYA, BOMBAY, DATED 26th DECEMBER, 1957

Government Resolution, Political and Services Department No. GDR-1955-X, dated the 2nd May, 1955. Government letter, Home Department No. MIS-1055/62546-B, dated the 1st February, 1956

Letter No. B.5602/53, dated the 19th September. 1957 from the Registrar, High Court (Appellate Side) Bombay.

RESOLUTION:

Government has decided that Advisory Committee should be formed in every District to assist the District Judges in making appointments to Class III and Class IV Services in the Judicial Department. The Advisory Committee for each

District should compose of the District Judge, the Assistant Judge and the Civil Judge, Senior Division. In a District where there is no Assistant Judge, the Advisory Committee should compose of the District Judge and the Civil Judge, Senior Division.

2. The rules for recruitment of candidates to Classes III and IV Services in the District are contained in the Appendix attached.

BY ORDER & IN THE NAME OF THE GOVERNOR OF BOMBAY.

Sd. V.N. Kalghatgi Assistant Secretary to the Government of Bombay, Home Department.

RECRUITMENT RULES FOR RECRUITMENT TO CLASSES III AND IV SERVICES IN THE SUBORDINATE JUDICIAL SERVICES-

1. The District Judge shall maintain a list of candidates for Class III and Class IV posts in his District and no candidate whose name is not on that list shall be employed in any Civil or Criminal Court.

2. The list shall contain names of candidates for recruitment to Class-III and Class IV posts separately namely for (a) Clerks, (b) Section Writes, (c) Stenographers, (d) Bailiffs and (e) Peons. Each part of the list shall be a separate one.

3. In preparing the list the District Judge shall act upon the advice of a Committee known as the Advisory Committee for recruitment to Subordinate Judicial Service in the District.

4. The Advisory Committee shall consist of the District Judge as the Chairman, Assistant Judge (for the time being working) in the District and the Civil Judge (Senior Division) (for the time being working) in the District, and if there is no Assistant Judge working in the District, then the Committee shall consist of the District Judge as the Chairman and a Civil Judge (Senior Division). If there is no Assistant Judge or a Civil Judge (Senior Division) the Committee shall consist of the District Judge as the Chairman and a Civil Judge (Junior Division) and Judicial Magistrate to be nominated by the Chairman.

5. The Advisory Committee shall prepare the list for recruitment to the various categories of the Class-III and the Class-IV Government Servants for the District. The list prepared by the Committee shall be final.

6. The number of candidates to be enlisted annually in each category of Class III and/or Class IV servants shall be such as to make the total number in each category equal to (a) the average temporary vacancies during the last two years plus (b) the expected permanent vacancies for the next year and an addition of 20 % of (a) and (b) for wastage.

7. Any list prepared by the Advisory Committee shall continue to remain in force till the list is exhausted.

8. If the number of candidates required under Rule 6 is small, the Advisory Committee may, in its discretion, not add to the previous list in any year.

9. Every year when the Advisory Committee meets to prepare a list, it shall also scrutinize the previous list in order to strike off persons ineligible for appointment from the said list.

10. Additions to each part of the list shall be made annually in August and the number of candidates to be enlisted shall be advertised in the local news paper of wide publicity and published in the various offices of the Department in the manner prescribed in paragraph 5 of Government Resolution, Finance Department No. 5011, dated the 26th September, 1928. The Advisory Committee shall also call for lists of eligible candidates from the Employment Exchange Officer of the respective Division and the Director of Social Welfare, Gujarat State Ahmedabad. Upon receipt of the applications and after considering the lists sent by the Social Welfare Officer and the Employment Exchange Officer, the Committee may select the number of required candidates after holding a test, if necessary. The filial selection, however, shall not be made without an interview.

13. A plain reading of the above referred Resolution of the then Government of Bombay of the year 1957 makes it very clear that they are not statutory rules framed under Article 309 of the Constitution of India, but they are executive instructions issued in exercise, of the powers under Article 162 of the Constitution of India, in consultation with the High Court as is evident that there is a reference of letter No. B-5602/53 dated 19th September, 1957 from the Registrar, High Court (Appellate Side) Bombay.

14. It appears that after bifurcation of Gujarat from the then State of Bombay on 1st May, 1960, the Government of Gujarat, in its General Administration Department, issued a Circular, which reads as under:--

No. GSF-1060 GOVERNMENT OF GUJARAT GENERAL ADMINISTRATION DEPARTMENT:

Ahmedabad, dated 1st May 1960.

CIRCULAR

With a view to avoiding any administrative difficulty, Government is pleased to direct that all rules and regulations, procedure, circulars, instructions, all schemes and sanctions prevailing in the former Bombay State will continue to operate in the new State of Gujarat until changed for modified by the Government.

By order and in the name of the Governor of Gujarat.

V. ISVARAN, Chief Secretary to the Government of Gujarat General Administration Department.

15. The power to make Rules as to the recruitment and conditions of service of

the employees of the subordinate courts vests in the State Government, in the absence of which the Governor may frame Rules under Article 309, and in the absence of both, administrative or executive instructions can be issued under Article 162 of the Constitution of India. Article 309 of the Constitution of India provides that subject to the provisions of the Constitution, Acts of the appropriate legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State. By virtue of the proviso, it is competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make Rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made, by or under an Act of the appropriate legislature under this Article and any Rules so made shall have the effect subject to the provisions of such Act. In other words, by the proviso, in the absence of the competent legislature making legislation, it is open to the Governor in the case of a State to make Rules, which will have force of law till such time law is enacted by the competent legislature.

16. In the instant case, we have found that there are no statutory rules framed under Article 309 of the Constitution of India. With that, we proceed to consider Article 162 of the Constitution of India. Article 162 sets out that subject to the provisions of the Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws. In other words, the executive power is co-extensive with the legislative power and can be exercised if the legislative power has not been exercised. In service laws, as is now settled, even if the rules have been made under Article 309 of the Constitution of India it is still open to issue instructions pursuant to Article 162, in those matters where rules are silent or not made. There is yet another Article which may be noted, namely, Article 166. That Article provides that all executive action of the Government of a State shall be expressed to be taken in the name of the Governor. Article 166(2) then sets out that the orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified by rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor. Sub-rule (3) sets out that the Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business insofar as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion.

17. The very nature of the executive instructions is that they are not part of the statute or enactment. The executive instructions and actions cannot be read like legislation, nor are enacted like legislation. The executive guidelines are

formulated in exercise of the executive powers with a view to guiding the authorities concerned and it can be amended from time to time for which no set procedure is required to be followed as in the case of statutory provisions.

18. It appears from the materials on record that the High Court on its administrative side constituted a Committee for framing Guidelines for centralized recruitment of persons to Class III and Class IV posts in various subordinate courts in the Districts, in view of the fact that the recruitment process undertaken at various Districts consumed a lot of judicial time and energy. The High Court took a policy decision in that regard and decided that recruitment to Class III and Class IV services should be centralized and should be conducted under the supervision of the High Court. It was also decided that common application's should be invited from different districts and the candidates should be asked to give preferences of the district. This would ensure that the candidates may not have to apply in different districts and the multiplicity of applications would get eliminated. It was also decided that the written examination would be objective in nature with a multiple choice question with or without negative marks. This would eliminate subjective assessment of the answers and would save time and energy in assessing question papers. It also appears that the Committee suggested that instead of amending the existing rules in the form of executive instructions, and getting them notified by the Government, the same could be brought in force by way of a High Court Notification or High Court's administrative direction/order.

19. The principal argument of all the counsel appearing for the appellants is that the High Court could not have issued such administrative directions/order without first approaching the State Government and requesting the State Government to make necessary amendments in the Resolution dated 26th December, 1957, issued by the Home Department of the then Government of Bombay. The basis of this argument is that Recruitment Rules are to be framed by the Government and the High Court has no control so far as the method, the manner and the mode of recruitment to Classes III and IV services is concerned. We are not impressed by such submission canvassed on behalf of the appellants. It is true that the power to make rules as to the recruitment and conditions of service of the employees of the subordinate courts, vests in the State Government, but the overall control so far as the manner, method and mode of appointment is concerned, they would definitely remain with the High Court by virtue of power conferred under Article 235 of the Constitution of India. By virtue of Article 235, the control vested in the High Court squarely extends to the Presiding Officers and also to the functionaries and ministerial staff attached to the District Courts and the Courts subordinate thereto. Since the controversy revolves around the language of Article 235, it is first apt to set it down for the purpose of reference.

Art. 235 CONTROL OVER SUBORDINATE COURTS.:--

The control over district courts and courts subordinate thereto including the

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

20. According to Article 235, the control over the district and subordinate Courts is vested in the High Court, including the posting and promotion of, and the grant of leave to, persons belonging to the State judicial service, and holding a post inferior to that of a District Judge. However, the High Court is not authorized to deal with any such person otherwise than in accordance with the conditions of service prescribed under the law. Article 235 is not to be construed as taking away from any such person, any right of appeal, which he may have under the law regulating his conditions of service. Article 235 is the pivotal provision. The control vested in the High Court by Article 235 over the subordinate judiciary is for the purpose of preserving its independence and its protection from the executive interference. The control vested in the High Court by Article 235 of the Constitution of India over the judiciary below it comprehends a wide variety of matters and is "exclusive in nature, comprehensive in extent and effective in operation". The High Court is the sole custodian of the control over the subordinate judiciary. The word "control" in Article 235 is used in a comprehensive sense. It includes general superintendence over the working of the subordinate courts. The expression "control" in Article 235 also includes the disciplinary control. The terminology used is "District Courts and the Courts subordinate thereto", and their control has been squarely vested in the High Court. To our mind, this terminology has been used compendiously to include within it the Presiding Judge and the functionaries and staff attached to him. If the intention of the framers of the Constitution was to confine and restrict the control of the High Court to the Presiding Officers of the District Courts and the other subordinate Courts, then such a wide ranging terminology would not have been used. It is a settled law that no part of a statute is to be interpreted as merely surplusage or to render substantial portion thereof as otiose except for very compelling reasons.

21. The analogy of Article 229 of the Constitution of India necessarily comes to our mind. In the context of the High Court itself, the administrative staff thereof has been put entirely within the power and control of the Chief Justice, including even the power of appointment and dismissal etc. and the prescription of their conditions of service. As regards the functionaries and the staff of the District Courts and the Courts subordinate thereto, the Constitution did not go that far and instead vested the control over the same in the High Court by virtue of Article 235. In *Mohammad Ghouse Vs. State of Andhra Pradesh* by its Chief Secretary, Secretariat, Hyderabad, Jaganmohan Reddy, J. speaking for the Bench has observed in the clearest terms as follows:--

The learned counsel for the petitioner says the word "Court" used in Article 235 does not signify the control over the person presiding over it. We must reject this argument as untenable. Both in Articles 227 and 235, the word "Court" has been used and it cannot be said that framers of the Constitution had not used this word to include persons presiding over those Courts or other functionaries, of those Courts. While the use of the word "Judge" may denote only the person the word "Court" when used not only includes the person presiding over that Court, but also all the functionaries of that Court and any matters pertaining thereto. The ordinary meaning to be given to this word not only includes the building in which the Court is held, but also the Judges and officials who preside there.

22. The abovesaid view was, in terms, approved and followed by the Full Bench in the Celebrated case of Nripendra Nath Bagchi Vs. Chief Secretary, Govt. of West Bengal, with the following observations:--

This case then came back to the Andhra High Court and the further decision of the Andhra High Court is reported in Mohammad Ghouse Vs. State of Andhra Pradesh by its Chief Secretary, Secretariat, Hyderabad, holding that (1) the word "Courts" includes persons presiding over those Courts and other functionaries of those Courts and that (2) the High Court has certainly jurisdiction to hold inquiries into the conduct of judicial officers and it is clear that it is not confined merely to the holding of a preliminary enquiry for the purpose of ascertainment whether there is a prima facie case for answering the charge. We respectfully agree with these two decisions of the Andhra High Court.

23. The aforementioned judgment of the Calcutta High Court was later affirmed by their Lordships and is reported as The State of West Bengal Vs. Nripendra Nath Bagchi, indeed, in that judgment also the following observations again seem to lend patent support to the view which we are inclined to take:--

In the case of the District Judges, appointment of persons to be and postings and promotions are to be made by the Governor but the control over the District Judge is of the High Court. We are not impressed by the argument that the word used is "District Court" because the rest of the article clearly indicates that the word "Court" is used compendiously to denote not only the court proper but also the presiding Judge. The later part of Article 235 talks of the man who holds the office.

24. In Mohammad Ghouse Vs. State of Andhra Pradesh by its Chief Secretary, Secretariat, Hyderabad, , it was also contended that the conditions of service were outside "control" envisaged by Article 235 of the Constitution because the conditions of service were to be determined by the Governor in the case of the District Judge and in the case of Judges subordinate to the District Judge by the Rules made by the Governor in that behalf, after consultation with the State Public Service Commission and with the High Court.

In paragraph 13 of the decision, Their Lordships observed:

We do not accept this construction

The conclusion is, therefore, irresistible that the control vesting in the High Court under Article 235 is complete. Such control cannot be abridged even by the conditions of service, if any, prescribed under Article 309 of the Constitution, which is itself subject to Article 235. The conditions of service can, however, prescribe the procedure to regulate the manner of exercise of the control vested in the High Court and the power of control would be so exercised.

25. This issue has been exhaustively discussed and explained by a Full Bench of this High Court in the case of R.M. Gajjar Vs. State of Gujarat and Others, The Full Bench, after tracing the historical and social background and the real objects behind the provisions in Chapter VI for the independence of the subordinate judiciary, and the nature of the control in Article 235, observed in paragraphs 8 and 9 as under:--

8. (B) Preamble, title of the provision and the true construction of Art. 235. Even the preamble or title which unravels the meaning of, these salutary provisions of Chapter VI is eloquent as it mentions "Subordinate Courts" and as even the heading for Art. 235 is "Control over Subordinate Courts". A bare perusal of Art. 235 emphasises that the provision is of widest control over "District Courts and Courts Subordinate thereto", and the width of this control is measured by the inclusive clause, where not only three specific topics are enumerated, of posting, promotion and grant of leave, but specific mention is made of the entire class of judicial officers i.e. of the persons of the subordinate judicial service and holding any post inferior to the post of District Judge, so that all doubt is finally settled as to the width of this inclusion. Article 236(b) defines judicial service as a service consisting exclusively of persons intended to fill the post of District Judge as widely defined in Article 436(a), and other civil judicial posts inferior to the post of District Judge. Therefore, the wide inclusion of judicial officers had initially a limited operation only to the subordinate civil judiciary, because the Directive Mandate of complete separation of judiciary from the executive could only be implemented gradually, and that is why Art. 237 in terms provides that the provisions of this Chap. VI could be applied by public notification by the Governor in relation to any class or classes of Magistrates in the State as they applied to persons of the judicial service. Such notifications have been issued in our State. So that exclusion of Magistrates also does not remain. It was to emphasise this wide inclusion even of the judicial officers that the latter part of Art. 235 had been so enacted that on such extension even class of Magistrates would be included. On no statutory principle of construction, therefore, this Article should be rewritten by recasting the opening part as if it was merely;

the control over persons belonging to the judicial service of a State and holding any post inferior to the post of District Judge (including the posting and promotion of and the grant of leave to such persons) because that would be rendering otiose the entire opening clause of Art. 235, whose import is emphasised both in the preamble of the Chapter and in the title of this Article to

unravel its true meaning and by deliberate change of language from the earlier Ss. 254-256 of the Government of India Act, 1935. On no settled principle of construction a constitutional provision can be so interpreted as to render these opening words "control over the District Courts and Courts subordinate thereto" mere surplusage or to render substantial portion thereof as otiose, except for compelling reasons. Redundancy is not a fault which could ever be attributed to our founding Fathers, and still if we confine this Art. 235 only to control over judicial officers belonging to the judicial service as defined in Article 236(b), this result would be reached. Even the constitutional history of the earlier provisions in Ss. 254-256, where only three topics of control, posting, promotion and leave to only the members of the subordinate civil judiciary had been mentioned, would clinch the issue that the change in language of the opening part of Art. 235 by the founding Fathers in the final draft was deliberate to leave no room for doubt that the control was not only over Courts proper in the compendious sense of its whole organism, but also the members of the judicial service defined in Art. 236(b) and that too in the widest sense, not limited to three enumerated topics in this later inclusive part. Therefore, on a plain grammatical construction keeping in our mind the constitutional behest of securing independence of judiciary and the direction of growth envisaged in Art. 50 of complete separation of judiciary from the executive, the whole purpose would be frustrated if the disciplinary control cannot be exercised over the entire Subordinate Courts, including the administrative staff, which was always treated as pointed out in Bagchi's case as historically inhering even in the limited administrative superintendence or control over the District Court and Courts subordinate thereto. Any other interpretation would be wholly destructive of the harmonious, efficient and effective working of the Subordinate Courts, if the High Court would be denuded of powers of control over the other administrative functionaries and ministerial staff of the District Court and the Subordinate Courts other than judicial officers. The Courts are institutions or organisms where all the limbs complete the whole Court and when the constitutional provision of control in Art. 235 is of such wide amplitude to cover both the Courts and personal belonging to the judicial service, there would be no reason to exclude from the scope of control all the other limbs of the Court, namely, administrative functionaries and ministerial staff of its establishment. Limitation may, of course, come in because of the concluding part as the persons concerned have a guarantee of the right of appeal under the law regulating conditions of service and because the High Court is also required to deal with them not otherwise than in accordance with the conditions of service prescribed under such law. Therefore, if these functionaries and ministerial staff have been appointed by the District Judge as defined in Art. 236(a), the disciplinary authority who would initiate the enquiry would not be the District Judge, and the controlling jurisdiction would be of the original character but the appellate or revisional or review jurisdiction in accordance with the relevant conduct and discipline rules or when the High Court is appointing authority, such controlling jurisdiction may also be original disciplinary jurisdiction where the High Court itself would have to initiate the enquiry. That

would be beside the point, for resolving the present question as to whether this wide Art. 235 which covers both within its ambit of control, the District Courts and Courts subordinate to as well as persons of the judicial service manning this Court, should be limited only to the later category against all canons of statutory construction. Nothing compelling in the context is indicated for adopting such a construction which would defeat the whole purpose of this wide clause and the purpose intended to be secured by this salutary, control jurisdiction.

9. (C) Conspectus of other provisions and light that could be had from them and from the entire context and setting. Nothing compelling in the context is shown to give the limited constitution to this wide constitutional control measure in Art. 235 so as to confine it only to the judicial officers i.e. the members of the judicial service. It is true that other Arts. 233 to 237 in this Chapter, which deal with appointments are so confined, and the interpretation clauses in Art. 236(b) so defines even such judicial service, with its further extension after a public notification even to Magistrate class, so that class of Magistrate even as per the evolutionary mandate of Art. 50 gets completely assimilated with the civil judicial service. That, however, does not compel this limitation to be introduced in the whole of Art. 235, which on its own wording has a totally wide context both of Courts as well as persons of judicial service, in the limited or extended sense, dependent on the issuance of the notification under Art. 235. To narrow down the clear words of this Art. 235, by reference to these other Articles in Chap. VI which apply in their context only to the members of the judicial service is against all canons of construction, and is tantamount to rewriting Art. 235, forgetting its past history and the reasons why this change in phraseology was adopted by the founding fathers from the existing pattern under the Government of India Act, 1935 in corresponding Ss. 254, 255 and 256, which only mentioned members of judicial service and enumerated only three matters of posting, promotion and leave to. As explained in *The State of West Bengal Vs. Nripendra Nath Bagchi*, this is to reverse the determined trend prevailing in this direction by further extension by advisedly using this wide expression "control over the District Courts and Courts subordinate thereto," in the final draft, along with taking out these provisions in Chap. VI from the Chap. XIV and placing them immediately after the High Court in Chap. V.

The aforesaid decision of the Full Bench was confirmed by the Supreme Court, which is reported in *R.M. Gurjar and another Vs. High Court of Gujarat and others*,

26. However, when the counsel for the appellants were confronted with this decision of the Full Bench, it was sought to be argued that the Full Bench no doubt has held that the control vested in the High Courts under Article 235 of the Constitution is exercisable over the ministerial officers and servants, but only in matters relating to disciplinary action. It may be true that the issue before the Full Bench was one relating to the enhancement of the penalty imposed by the District Judge upon a member of the ministerial staff of the subordinate court in

exercise of the powers of review conferred by Rule 23 of the Gujarat Civil Services (Discipline and Appeal) Rules, 1971, but that by itself is no reason to interpret the Full Bench decision in the manner as suggested by the learned counsel for the appellants. There is no reason for us to give a restricted meaning to the word "control" as appearing in Article 235 of the Constitution of India. In *Mohammad Ghouse Vs. State of Andhra Pradesh by its Chief Secretary, Secretariat, Hyderabad*, the Supreme Court observed that the word "control" was used for the first time in the constitution and the same is accompanied by the word "vests", which is a strong word. It indicates that the High Court is made the sole custodian of the control over the subordinate judiciary. Even if we believe for the time being that the executive instructions as contained in the Resolution of the year 1957 issued by the then State of Bombay in exercise of the powers under Article 162 of the Constitution of India has prescribed a procedure for recruitment to Classes III and IV services in the Districts and Courts subordinate thereto, that will always be subject to the other provisions of the Constitution and is therefore, subject to the power of the High Court vested in them under Article 235 of the Constitution of India. In the present case, the appellants are aggrieved by the recruitment process undertaken by the High Court because, according to them, they should not be replaced by another set of illegally appointed candidates.

27. We are in agreement with the view taken by the learned single Judge that the High Court has not framed any statutory rules for recruitment to the posts of Class III and Class IV cadres in the subordinate courts in purported exercise of powers under Article 235 of the Constitution of India, but the High Court thought fit to have a Centralized Recruitment Cell at one place with the sole object to save the judicial time of the judicial officers at the district level and such exercise of powers by the High Court could not be said to be in derogation to the executive instructions of the State Government providing for a procedure of recruitment. Therefore, it could not be said that the High Court has framed rules relating to conditions of judicial officers attached to the District Courts and the Courts subordinate thereto.

28. Ordinarily, any Rules relating to judiciary, be it one for the members of the judicial service of the State or the ministerial officers and servants on the establishment of the subordinate courts, are framed by the High Court and such rules are thereafter forwarded to the State Government for its approval, so that the State Government could publish it in the official gazette. Once the Rules are approved by the State Government, they will attain the status of statutory rules as provided under Article 309 of the Constitution of India. The reason is also very plain and simple. The High Court as the sole custodian of the subordinate judiciary will be the best judge to decide as to what should be the criteria or the manner, method and mode of recruitment of candidate's to serve the subordinate judiciary at its best. In our opinion, the manner, the method and the mode of recruitment will not be a part of the conditions of service. The conditions of service will come into play only after a person is appointed. If the conditions of

service has prescribed the age of superannuation, then the High Court cannot, in exercise of its powers under Article 235 of the Constitution of India, change the same as the word "control" in Article 235 of the Constitution of India does not comprehend and take within its sweep changing the conditions of service.

29. However, the word "control" does comprehend and take within its sweep the manner, the mode and the method of recruitment. If we go by the terms of the Government Resolution of 1957, then in that case it is the Advisory Committee consisting of the District Judge, the Assistant Judge and the Civil Judge (Senior Division), who has to make the recruitment. They are also directly under the control of the High Court by virtue of Article 235 of the Constitution of India. In the present case, the High Court, instead of asking the Advisory Committee of each of the districts in the State to undertake the process of recruitment, thought fit to have a Centralized Recruitment Cell for the recruitment of Classes III and IV services in the subordinate judicial services. For that purpose, in our view it was not mandatory for the High Court to first approach the State Government requesting them to make the necessary amendments in the Government Resolution of 1957. We are of the view that any Rules or executive instructions framed with regard to the ministerial officers and servants on the establishment of the subordinate courts is concerned, must be read in a manner as to make them consistent with the administrative superintendence or control jurisdiction of the High Court under the Constitution. The High Court should not be asked to run to the State Government in all such matters, save and except in those cases, which involve incurring of additional financial liability for which sanction would be necessary.

30. In the aforesaid context, we may refer to a decision of the Supreme Court in the case of K.A. Nagamani Vs. Indian Airlines and Others, In that case the appellant was appointed as a Programmer with the Indian Airlines in the year 1984. The appellant was promoted to the higher post of Assistant Manager in the department of Electronic Data Processing (for short "EDP") in the year 1986 and confirmed in the said post in 1987. The EDP consisted of four divisions, namely, software, hardware, data communications and computer operations. Indian Airlines Officers Association vide its representations dated 19.9.1990 and 28.9.1990 suggested and requested the management to merge the hardware and software cadres and to prepare a common seniority list. A common seniority list dated 24.9.1990 was drawn for the purpose of promotions. Thereafter, interviews were held for the post of Deputy Manager, the said post was to be filled from the merged seniority list of hardware and software cadres. The management informed the appellant and others that their candidatures were considered for filling up the post of Deputy Manager. Thereafter, the Respondent Nos. 2, 3 and 4 were selected for the post of Deputy Manager. The appellant unsuccessfully challenged the promotion of Respondent Nos. 2, 3 and 4 as the writ petition filed by her was dismissed and confirmed in the Letters Patent Appeal by the Division Bench of the High Court. The main thrust of the submission before the Supreme Court by the appellant in person was that the

promotion to the post of Deputy Manager could not have been made based on the terms of the settlement between the Indian Airlines and its Officers Association. It was submitted that Rule 4, Clause (d) of the Recruitment and Promotion Rules provided that within a department, employees would be divided into kindred occupational groups called cadres as shown in the Schedule to the Rules and seniority shall be on the basis of such cadres. It was also submitted that the settlement arrived at between the management and the officers association was contrary to the recruitment and promotion rules which govern the promotions of the officers from the lower post to the higher post. It was also submitted that the recruitment and promotion rules were statutory in nature and were binding upon the management. The Supreme Court in paragraph 11 of its judgment posed the following question.

11. The main issue that arises for our consideration is whether the Recruitment and Promotion Rules are statutory in nature or mere administrative instructions?

31. The Supreme Court noticed that the said Rules were issued in exercise of the powers conferred by Rule 4 read with Rules 8 to 15 of the Indian Airlines Corporation Service Rules, the Indian Airlines Corporation (Aircraft Engineering Department) Service Rules and the Indian Airlines Corporation (Employees other than flying crew and those in the Aircraft Engineering Department) Service Rules.

32. Section 44 of the Air Corporations Act, 1953 was taken into consideration by the Supreme Court which empowered the Central Government to make rules to give effect to the provisions of the Act. Section 45 conferred power on the Corporation to make regulations which provide that each of the Corporation may subject to the rules made by the Government, by notification in the official gazette, make regulations not inconsistent with the Act or the Rules made thereunder for the administration of the affairs of the Corporation and for carrying out its functions.

33. After taking into consideration the provisions of law and the recruitment and promotion Rules, the Supreme Court observed in paragraphs 22 and 23 as under:

22. As noticed hereinabove the Recruitment and Promotion Rules were framed in exercise of the powers conferred under the Regulations referred to hereinabove. Be it noted, there is no power vested in the Corporation to make any rules since Section 44 of the Act confers power to make rules only in the Central Government and not in the Corporation. The Corporation is entitled to make only regulations which it did and published by way of Notification referred to hereinabove dated 6-4-1955. The Recruitment and Promotion Rules are not even notified in the Gazette as it is not required whereas the service Regulations referred to herein above have been gazetted.

23. The Indian Airlines Corporation Employees Service Regulations, 1955 which are made in exercise of the powers conferred upon the Corporation by the Act are undoubtedly statutory in nature but the Recruitment and Promotion Rules are not statutory in their nature. These Rules are not framed in exercise of any Rule

Making Power. Mere administrative rules are not legislation of any kind. They are in the nature of statements of policy and the practice of Government departments, statutory authorities, whether published or otherwise. Statutory rules, which are made under the provisions of any enactment and regulations, subject to Parliamentary approval stand on entirely different footing. The administrative rules are always considered and have repeatedly been held to be rules of administrative practice merely, not rules of law and not delegated legislation and they have no statutory force. Mere description of such rules of administrative practice as "rules" does not make them to be statutory rules. Such administrative rules can be modified, amended or consolidated by the authorities without following any particular procedure. There are no legal restrictions to do so as long as they do not offend the provisions of the Constitution or statutes or statutory rules as the case may be.

34. In our opinion, the proposition of law as explained by the Supreme Court in paragraph 23 of the judgment applies with all force so far as the present Appeals are concerned. We are also of the opinion that deviation, if any, from the strict procedure prescribed by law would not vitiate the action taken by the High Court in exercise of its powers under Article 235 of the Constitution of India in the interest of administration of the subordinate judiciary unless it could be shown that such an act had resulted in gross injustice to the affected party. Mr. Jani, the learned Government Pleader appearing for the State Government is justified in submitting that the appellants are in no manner concerned as to what should be the recruitment procedure, more particularly, having participated in the same without any objection of any nature. Mr. Jani is also right in submitting that assuming for the moment that there is substance in the submission of the learned counsel for the appellants that the High Court, without seeking any amendment through the State Government in the administrative or executive instructions of 1957, could not taken upon itself the procedure of recruitment through a centralized recruitment cell, even then such action will not vitiate the recruitment. Even if the Government would have been approached the Government could not have refused as Mr. Jani submitted that the Government has hardly any say in the matter as to how recruitment should take place in the Class-III and Class-IV services of the subordinate judicial service.

35. Our attention has been drawn to a Government Resolution dated 26th July, 2011, issued by the Government of Gujarat in its Legal Department, with respect to implementation of the recommendations of First National Judicial Pay Commission for non-judicial staff of the subordinate courts of the State. In the schedule attached to the said Resolution, we find that one of the recommendations of the Commission is with regard to the setting up of a Recruitment Cell in each District and in the City Civil Court or in other cities for the purpose of collecting information continuously as to the vacancies arising upon retirement or promotion or resignation. The recommendation states that such Cell would assist the selection committee and process the applications received for the post and shortlist them according to the guidelines of the

selection committee. The Cell should also be provided with the adequate staff. As against that, the Government made its stance very clear that such a recommendation needs to be considered by the High Court, as the High Court would be the best authority so far as the subordinate judiciary is concerned. Accordingly, the Government left the decision to be taken by the High Court, with an understanding that there was no additional Financial burden with the adoption of such a system. In our opinion, the Government Resolution of 1957, providing for the mode and method of recruitment virtually stands replaced to a certain extent by the Resolution of the State Government dated 26th July, 2011. The High Court, instead of going by the recommendation of the Shetty Pay Commission, thought fit to have a Centralized Recruitment Cell instead of Recruitment Cell in each District Court and in the City Civil Court, with the avowed object to save the judicial time of the judicial officers to which the State Government has no objection.

36. Thus, we are of the opinion that there is no merit in the principal contention as raised by the learned counsel for the appellants that the decision of the High Court to make recruitment to Classes III and IV services in the subordinate judicial services through a Centralized Recruitment Cell is beyond its power as conferred under Article 235 of the Constitution of India, and contrary to the executive instructions of 1957.

37. We shall now look into the decisions relied upon by Dr. Sinha, in support of his submissions.

Dr. Sinha has placed strong reliance on the decision of the Supreme Court in *B.S. Yadav and Others Vs. State of Haryana and Others*, in support of his submission that Article 235 does not confer upon the High Court, the power to make Rules relating to the conditions of service of the judicial officers and the staff attached to the District Courts and the Courts subordinate thereto. In that case, the Supreme Court held that there was no power in the High Court to pass a law, though rules made by the High Court in exercise of power conferred upon it in that behalf might have the force of law. Drawing a distinction between the power to pass a law and the power to make rules, which by law, have the force of law, the Supreme Court held that the power of control vested in the High Court by Article 235 is made subject to the law which the State legislature may pass for regulating the recruitment and service conditions of the judicial officers of the State. There cannot be any dispute with the proposition of law explained by the Supreme Court, but the ratio of the decision would not help the clients of Dr. Sinha because in the present case, it could not be said that the High Court framed rules relating to the conditions of service or acted contrary to the rules laying down the conditions of service. As discussed above, in the present case, the High Court took decision to have a Centralized Recruitment Cell instead of recruitment cell in each of the districts for recruitment to Classes III and IV services in the subordinate judicial service.

38. In the case of *H.C. Puttaswamy and others Vs. The Hon"ble Chief Justice of*

Karnataka High Court, Bangalore and others, the High Court of Karnataka invited applications for the posts of, 40 Second Division Clerks and 25 posts of Typists in the establishment of the High Court. The Notification provided that the selection would be to fill up existing vacancies and for preparing a waiting list. A large number of candidates including the appellants submitted their applications. The then Chief Justice of the High Court, who was the competent authority in the matter, appointed as many as 398 candidates as against the 40 posts advertised of them the Chief Justice retained 56 on the establishment of the High Court and the rests were transferred to the subordinate courts. It was argued before the Supreme Court that the selection and appointment to the cadre of Second Division Clerks in all the Departments of the State Government were regulated by Rules called "The Karnataka Civil Services (Ministerial Posts) Recruitment Rules, 1966. The said Rules were made applicable to the judicial Department also by the statutory rules called "The Karnataka Subordinate Courts (Ministerial and other Posts) Recruitment Rules, 1977. It provided that 90% of the posts of the Second Division Clerks on the establishment of the subordinate courts should be filled up by direct recruitment in accordance with the Karnataka State Civil Service Rules, 1966. It also appears that according to the provisions of the Rules, every District Judge was the appointing authority and consequently, every district constituted a recruitment unit. The District Judge being the unit head, had to send a requisition to the Public Service Commission, intimating the number of vacancies available in his establishment for appointment. The Public Service Commission thereafter would send the list of the selected candidates to the District Judge according to his requisition. In the facts of that case, the Supreme Court took the view that in view of the undisputed procedure for recruitment prescribed by the rules, the Chief Justice could not have disregarded the authority of the Public Service Commission to make selection and by pass the power of the District Judge to make appointment. The Court held that the Chief Justice could not have taken upon himself the power of both the authorities of making selection as well as appointment in the establishment of the subordinate courts. We are afraid that the ratio of this decision also is not helpful to the clients of Dr. Sinha, as in the present case, the recruitment could not be termed as one contrary to the Government Resolution of 1957.

So far as the case on hand is concerned, the decision to constitute a Centralized Recruitment Cell for the purpose of centralized recruitment process was not taken by the Chief Justice of the High Court, but the same was taken by the High Court as a whole being the sole custodian of the subordinate judiciary, and the State Government also left it for the High Court to take an appropriate decision in that regard.

39. In *State of Jammu and Kashmir Vs. A.R. Zakki and others*, the Readers and Librarians employed in the High Court of Jammu and Kashmir had submitted a representation to the Chief Justice of the High Court, praying that a fix quota be reserved for the employees of the High Court for recruitment to the service as they had no prospects of future promotion in their service. The said

representation was considered by the Judges of the High Court at a Full Court meeting and it was resolved that the Rules be amended in a way so as to provide for reservation of 25% vacancies in the service by way of promotion/transfer of Assistant Registrar, Reader, Court Officer and Librarian. The High Court proposed that Rule 4 of the Rules should be substituted accordingly. The proposal for amendment of the Rules made by the High Court was forwarded to the State Government. However, no action was taken by the State Government on the proposal for amendment of the Rules. Accordingly, a writ-petition was filed praying for a writ of mandamus commanding the State Government to implement and give effect to the recommendations of the High Court and to direct them to reserve quota for the service as recommended by the High Court. Such writ-petition was allowed by the learned single Judge of the High Court, and the judgment and order of the learned single Judge was confirmed in LPA. The State Government assailed the judgment of the High Court mainly on the ground that such a direction by way of mandamus could not have been issued under Article 226 of the Constitution of India. In such circumstances, the Supreme Court took the view that a writ of mandamus could not have been issued to the legislature to enact a particular legislation and the same would hold good as regards the executive when it exercised the power to make rules, which were in the nature of a subordinate legislation. It appears that this decision has been relied upon by Dr. Sinha to fortify his submission that in the present case also, the High Court before taking the decision to have a Centralized Recruitment Cell, should have approached the State Government for making necessary amendments in the Rules. The Supreme Court took the view that normally, the recommendations made by the High Court for any amendment in the rules should be accepted by the State Government, but, if in any particular case, the State Government, for good and weighty reason, finds it difficult to accept the recommendations of the High Court, then the High Court must undoubtedly reconsider the matter, and should not issue a writ of mandamus. In our opinion, the ratio of this judgment also will not help the clients of Dr. Sinha, as we have already discussed as to why it was not necessary for the High Court to approach the State Government. The State Government having made its stance very clear that it is for the High Court to take an appropriate decision in the matters of the present nature and the State Government has no role to play, the decision relied upon would not save the situation for the appellants.

40. In the case of Malik Mazhar Sultan and Another Vs. U.P. Public Service Commission and Others, the Supreme Court thought fit to issue general directions and provided a time schedule to be adhered to for filling up vacancies that may arise in Subordinate Courts and the District Courts. It was observed by the Supreme Court that the selections are required to be conducted by the authorities concerned according to the existing judicial service rules in the respective States/Union territories. The Supreme Court also observed that where selection of subordinate judicial officers was not being done by the High Courts, such selection should be entrusted to the High Courts by amending the relevant

rules. Taking a cue from such observations, Dr. Sinha has placed reliance on this decision to fortify his submission that selection must be in accordance with the relevant rules. We are afraid that the observations of the Supreme Court in the case of Malik Mazhar Sultan (*supra*) fell in altogether a different factual situation. In that case, the question before the Supreme Court was whether the recruitment in the subordinate courts should be conducted by the High Court itself or by Public Service Commission under the supervision of the High Court. Most of the States were willing to transfer the work to the High Court of their respective State, but few States expressed their willingness of continuing with the existing system. In such circumstances, the Supreme Court took the view that setting up of question papers and evaluation of the answer sheets should be entrusted to the respective High Courts. This decision also would not help the clients of Dr. Sinha in any manner.

41. In *Dayaram Asanand Gursahani Vs. State of Maharashtra and Others*, the issues before the Supreme Court were twofold. Whether the appellant was entitled to reckon, for the purposes of his seniority in the cadre of District Judges, the period during which he had worked as an Assistant Judge, in accordance with the proviso to sub-clause (b) of Clause (i) of sub-rule (2) of Rule 5 of the Bombay Judicial Service Recruitment Rules, 1956, and consequently, whether the appellant was entitled to get the salary and allowances in the selection grade scale or to be posted as an Inspecting Judge. The Supreme Court held that the pay-scale to which a judicial officer was entitled, was a condition of service, which could be regulated by a statute or rules made under the proviso to Article 309 or by executive instructions issued under Article 162 of the Constitution. According to the Supreme Court, it could not come within the range of the expression "control" in Article 235. It is only when there is such a law, rule or executive instruction, the High Court may act under Article 235 of the Constitution to sanction it, or to refuse to sanction. This decision also has been relied upon to fortify the submission that the method, manner and the mode of recruitment is a condition of service, which would be regulated by a statute or rules made under the proviso to Article 309 of the Constitution of India, or by executive instructions issued under Article 162. This decision also would not help the appellants as we have explained why there has been no intervention of the High Court so far as the conditions of service is concerned.

42. We shall now look into the issue as regards the nature of the appointments of the appellants made at the relevant point of time.

It is not in dispute that except in the case of the appellants of LPA No. 809 of 2013, the appointments of all other appellants were on purely ad hoc and temporary basis. It is also not in dispute that at the time of making the appointments, the Advisory Committee had not advertised in the local newspaper of wide publicity, and published in the various offices of the Department, in the manner prescribed in paragraph 5 of the Government Resolution, Finance Department No. 5011 dated 26th September, 1928, as laid down, according to

Clause 10 of the Government Resolution dated 26th December, 1957. Although it has been vociferously submitted that the Advisory Committee had called for a list of the eligible candidates from the Employment Exchange Officer of the respective Division and the Director of the Social Welfare Department, State of Gujarat, we are not impressed by such submission so as to come to the conclusion that the appointments were regular in nature. It is a settled law that an employment or appointment to the public service dehors or in violation of the recruitment norms or appointment rules will not only offend Articles 14 and 16 of the Constitution, but also frustrate the very purpose of enacting the law leading to frustration and disappointment to the eligible and meritorious candidates.

43. In the present case, as we have discussed, there are no statutory rules framed under Article 309 of the Constitution of India, but the method of recruitment has been laid down in the form of guidelines issued by the Government Resolution of 1957. We have referred to Clause 10, which states that recruitment must be after wide publicity in a local newspaper. It is only thereafter that it could be said that a regular recruitment process was undertaken so as to confer the status of a selected candidate, and as the one of a regularly appointed candidate. Articles 14 and 16 of the Constitution of India guarantee the fundamental right of equality before the law and equality of opportunity for all citizens in all matters relating to employment or appointment to any office under the State. Article 16 is only an incident of the general concept of equality enshrined in Article 14 in the matters of appointment and employment to the public office. Equality guaranteed by Article 16 is of the opportunity to apply for the appointment to the posts under the State, and to be considered on merits. Any employment or appointment to the public office under the State will offend the guarantee of equal opportunity, if the appointment or employment is in violation of the provisions of Articles 14 and 16 of the Constitution of India. Indisputably, in the instant case, the appellants, as referred to above, were not appointed strictly in terms of the Government Resolution of 1957 and even at the time of issuing the appointment letters, it was made very abundantly clear that their appointments were purely ad hoc and on temporary basis and they shall have no right to remain on the posts. It is also not in dispute that each of the appellants had executed undertakings also of the said nature. We are of the opinion that the appointments were not regular and by that the equal opportunity to other similarly situated candidates was denied. That did offend the fundamental right of eligible deserving candidates guaranteed under Articles 14 and 16 of the Constitution.

44-45. Having regard to the nature of the appointments of the appellants, they cannot assert the right to hold the post or continue in service merely because they were initially appointed for certain period, or on ad hoc basis, as the exigency of the services required them to be appointed for a particular period. We are conscious of the fact that the appellants have worked for around 5 to 6 years without any complaints. We are also conscious of the fact that they must have gained enough experience, but at the same time we should not overlook

the fact that despite the experience of 5 to 6 years in service they were no match for the freshly recruited candidates, who were found more meritorious despite having no experience or little experience in the job.

46. In *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, the Supreme Court held as under:

Persons who get employed, without the following of a regular procedure or even through the backdoor or on daily wages, have been approaching the Courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the posts concerned. The Courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service. A class of employment which can only be called "litigious employment", has risen like a phoenix seriously impairing the constitutional scheme. While directing that appointments, temporary or casual, be regularized or made permanent, the courts are swayed by the fact that the persons concerned has worked for some time and in some cases for a considerable length of time. Such an argument fails when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution. Merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the Court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right.

It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain - not at arm's length -- since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment perpetuate illegalities and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the Court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the Court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings

at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it.

When the court is approached for relief by way of a writ, the Court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution. It is therefore not possible to accept the argument that the State action in not regularising the employees was not fair within the framework of the rule of law.

Orders for absorption, regularization or permanent Continuance of such employees are passed apparently in exercise of the wide powers under Article 226 of the Constitution of India. Whether the wide powers under Article 226 of the Constitution is intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognized by our Constitution, has to be seriously pondered over. It is time, that Courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. The passing of orders for continuance, tends to defeat the very Constitutional scheme of public employment. It has to be emphasized that this is not the role envisaged for High Courts in the scheme of things and their wide powers under Article 226 are not intended to be used for the purpose of perpetuating illegalities, irregularities or improprieties or for scuttling the whole scheme of public employment. Its role as the sentinel and as the guardian of equal rights protection should not be forgotten.

High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent Continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that

they do not interfere, unduly with the economic Arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

47. It is also not in dispute that most of the appellants, pursuant to the advertisement issued by the High Court, applied and appeared in the test. In such circumstances, we fail to understand how they can turn around and challenge the recruitment on the ground that the same is ultra vires.

48. In the aforesaid context, we may refer to the decision of the Supreme Court in *G. Sarana Vs. University of Lucknow and Others*, wherein also a similar stand was taken by a candidate and in that context the Supreme Court had declared that the candidate who participated in the selection process cannot challenge the validity of the said selection process after appearing in the said selection process and taking opportunity of being selected. Para 15 inter alia reads thus:

15.... 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.

49. In *P.S. Gopinathan Vs. State of Kerala and Others*, the Supreme Court relying on the above principle held thus:

44. Apart from the fact that the appellant accepted his posting orders without any demur in that capacity, his subsequent order of appointment dated 15-7-1992 issued by the Governor had not been challenged by the appellant. Once he chose to join the mainstream on the basis of opinion 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 14-1-1992. 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*,

50. In *Union of India (UOI) and Others Vs. S. Vinodh Kumar and Others*, at paragraph 18 it was held by the Supreme Court as under:

18.....It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same.

51. Dr. Sinha laid much emphasis and earnestly urged before us to take a sympathetic view in the matter, more particularly keeping in mind the fact that more than 1000 families are likely to be deprived of their bread and butter. We are conscious of this fact, but we are afraid this plea of equities will not help the appellants. We are of the opinion that when there is a conflict between the law and equity, it is the law which must prevail, as stated in the Latin maxim "*dura lex sed lex*" which means "the law is hard, but it is the law".

52. The Supreme Court in *Mada Manchi Ramappa v. Muthaluru Bojjappa*, reported in (2000) 7 SCC 521, has held that what is administered in the Courts is justice according to the law, and considerations of fair play and equity, however important they may be, must yield to clear and express provisions of the law. We are afraid, if we go by the sentiments and consider the equities in favour of the appellants, then we may be doing justice with the appellants by doing injustice with more meritorious candidates who have found place in the merit list. In such circumstances, we are of the opinion that no relief should be granted in favour of the appellants.

53. As stated above, we have noticed one distinguishing feature so far as the appellants of LPA No. 809 of 2013 are concerned. We have noticed that the appellants, pursuant to the advertisement dated 7th July, 2003 issued by the District Judge, Valsad, were duly selected by the Advisory Committee and they were appointed by the District Judge on the Class IV posts of Peon/Watchmen/Watermen/Civil Jail Warden. After some time, the District Judge sought permission of the High Court for appointment of the appellants on the Class III post of Assistants (Junior Clerks), and such permission was granted by the High Court vide its order dated 11th March, 2005. Accordingly, the appellants were appointed as Assistants (Junior Clerks), vide order dated 21st March, 2005 and 17th July, 2006. It also appears that the process of regular recruitment for filling up the posts of Assistant (Junior Clerk) was not undertaken for all these years and the same could be undertaken only by way of centralized recruitment initiated by the High Court pursuant to its advertisement dated 15th February, 2012. It appears that most of the appellants could not even apply as they had crossed the upper age limit prescribed by the High Court. We find substance in the submission of Mr. Pujara that his clients could have been regularized on the said post even if the Advisory Committee would have acted according to the recommendations of the First National Judicial Pay Commission for non-judicial staff of the subordinate courts of the State.

54. We have noticed that the Government of Gujarat in its Resolution dated 26th July, 2011, has considered the reservation for Class IV employees in Class III posts. According to the recommendation of the Commission, 25% of the entry level clerical posts should be reserved in favour of Class IV employees, who possess the requisite qualification in the ratio of 1:2 for process waivers and other Class-IV employees. According to Mr. Pujara, his clients do possess the requisite qualification for being promoted to Class III posts in the quota of 25% reservation. From the materials on record, it appears that at the time of the advertisement dated 15th February, 2012 issued by the High Court, 70 posts of Assistant (Junior Clerk), Class-III were vacant and 21 vacancies of Assistant (Junior Clerk), Class-III were to arise in future, taking the tally to 91 vacancies. At present there are 77 vacancies of Assistant (Junior Clerk), Class-III. The sanctioned strength of Assistant (Junior Clerk) in the Courts of Valsad District is 113, out of which 36 posts are filled-up and 77 posts are vacant. We are of the opinion that if such benefit as recommended by the Shetty Pay Commission and

provided in the Government Resolution dated 26th July, 2011 is not given to the appellants, then they would get reverted to their Class IV posts after a period of almost eight years, and that too after working on the Class III post. The Government has made its stance very clear that it is for the High Court to issue appropriate instructions in that regard as no financial implications are involved in providing such promotions.

In such circumstances, we are of the opinion that the appellants of LPA No. 809/13 are entitled to the relief as prayed for.

55. Although Mr. Shah, the learned Standing Counsel appearing for the High Court submitted that this aspect was not highlighted before the learned single Judge and the learned single Judge has not dealt with this issue at all, we are of the opinion that this issue being a pure question of law, we can always take into consideration even at the stage of appeal. Although Mr. Pujara has disputed the stance of the High Court in this regard and submitted that this aspect was very much argued before the learned single Judge, but the same has not been dealt with. Mr. Pujara also took us through the pleadings as contained in the writ petition and we find that there are clear pleadings in paragraph 5 of the petition.

56. In view of the aforesaid discussion, our final conclusions in these appeals are as under:--

1. The High Court in exercise of its power under Article 235 of the Constitution of India, can control the method, manner and the mode of recruitment of candidates to Class-III and Class-IV services in the District Courts and the Courts subordinate thereto, despite the fact that the power to make Rules as to the recruitment and conditions of service of the employees of the subordinate courts vests in the State Government;

2. The control vested in the High Court under Article 235 of the Constitution is exercisable not only over the members of the judicial services of the State as defined in Article 236(b) of the Constitution of India, but also over the ministerial officers and servants on the establishment of the subordinate courts in the matters of appointment, over and above the disciplinary control;

3. The policy decision of the High Court to have a Centralized Recruitment Cell for the purpose of undertaking the centralized selection process for recruitment of candidates to Class III and IV services in the respective District Courts could not be said to be in any manner illegal or in violation of the executive instructions as contained in the Government of Bombay, Home Department Resolution dated 26th December, 1957;

4. The High Court was not obliged in law, before formulating a policy to have a centralized recruitment process, to recommend the Government for making necessary amendments in the administrative instructions as contained in the Resolution of 1957, as the High Court should not be asked to run to the Government in all such matters as the Rules, if any, framed with regard to the

members of such establishments, either administratively or under Article 309 of the Constitution, must be so read as to make them consistent with the administrative superintendence or control jurisdiction of the High Court under the Constitution;

5. The appellants, except the appellants of Letters Patent Appeal No. 809 of 2013, have no indefeasible right of remaining on the post, taking into consideration the fact that their initial appointments were ad hoc and on temporary basis.

57. In the result, Letters Patent Appeal Nos. 794 of 2013, 802 of 2013 and 810 of 2013 are ordered to be dismissed with no order as to costs. The judgment and order passed by the learned single Judge to that extent is hereby confirmed.

58. Letters Patent Appeal No. 809 of 2013 is hereby allowed to the aforesaid extent. The judgment and order passed by the learned single Judge, qua the appellants of LPA No. 809 of 2013 is set aside. We direct the High Court to issue appropriate instructions to the Principal District Judge, Valsad for passing appropriate orders of promotion of the appellants of LPA No. 809 of 2013, from Class-IV to Class-III posts, considering the 25% reservation provided for the same, according to the Government Resolution dated 26th July, 2011. The High Court shall issue such directions to the Principal District Judge, within a period of fortnight from today and the Principal District Judge in turn shall pass necessary orders in accordance with law, within a period of one week thereafter. We direct the High Court that the conditions of service so far as the appellants of LPA No. 809 of 2013 is concerned, shall not be disturbed.

In view of the orders passed in the main appeals, the connected Civil Applications would not survive and the same are accordingly disposed of.

FURTHER ORDER:

After this order is passed, the learned advocates appearing on behalf of the appellants other than LPA No. 809 of 2013, pray for stay of operation of our order. In view of what has been stated above, we find no reason to stay our order. The prayer is rejected.