

CASE NO.:
Writ Petition (civil) 609 of 2000

PETITIONER:
MAHARASHTRA STATE JUDL. SERVICE ASSN. & ORS.

Vs.

RESPONDENT:
HIGH COURT OF JUDICATURE AT BOMBAY AND ORS.

DATE OF JUDGMENT: 20/02/2002

BENCH:
G.B. Pattanaik & S.N. Phukan

JUDGMENT:

PATTANAIAK, J.

This petition under Article 32 of the Constitution by the promotee District Judges, who are members of the Maharashtra State Judicial Service Association, assails the decision of the Bombay High Court on Administrative side on the question of inter se seniority of District Judges, appointed by nomination from the Bar and those who are promoted from the rank of Additional District Judge. On consideration of the relevant statutory rules and the judgment of this Court in Balasaheb Vishnu Chavan and anr. Vs. State of Maharashtra and Ors., 1984(2) S.C.C. 675, the High Court came to the conclusion that District Judges, who are appointed by nomination would reckon their seniority in the cadre from the date of appointment, even though they are asked to work as Additional District Judges and the promotee District Judges would reckon their seniority from the date of their promotion. In the writ petition that had been filed, Smt. U.R. Joshi, a direct recruit District Judge had been arrayed as respondent No. 3 in her individual capacity as well as representative of the direct recruit nominated District Judges. She however appeared in her individual capacity alone and amongst the direct recruits, she was the senior-most. When the case had appeared before the Court on 16.1.2002, and even though a statement was made by the counsel appearing for the promotee-petitioners that individual notices to each of the direct recruit had been offered, even though they had not been arrayed as parties, an application for being impleaded as party respondents had been made by several such direct recruits and the prayer for impleadment has been allowed and time had been granted to the impleaded direct recruits respondents to file counter affidavit within ten days from that date. The impleaded direct recruits have filed their counter affidavit and were represented by Shri M.L. Verma, the learned senior counsel. Respondent No. 3, the senior-most direct recruit District Judge was represented by Shri Bhimrao N. Naik. Shri S.M. Jadhav appeared for the High Court and Shri S.V. Deshpande, appeared for the State of Maharashtra. On behalf of the direct recruit respondents, a preliminary objection had been taken by Shri M.L. Verma that the dispute being one of inter se seniority within a cadre, the Court ought

not to entertain a petition under Article 32, as the parties were entitled to approach the High Court under Article 226 against the Administrative decision of the Bombay High Court. We have no doubt in our mind that an administrative decision of the Court could be assailed by filing a writ petition under Article 226 in the High Court itself, but this Court having entertained the petition under Article 32 by issuing rule on 8.12.2000 and the dispute being one, which centres round interpretation of the relevant rules and both the direct recruits and the promotees having made their stand known, and further no disputed question on facts having arisen, we do not think it appropriate to direct the promotees to approach the High Court in the first instance. We, therefore, heard the parties at length on the merits of the matter.

The Service conditions of the employees belonging to the Judicial Service of the State of Maharashtra is governed by a set of rules framed by the Governor of Maharashtra in consultation with the High Court in exercise of powers conferred by Articles 233 and 234 of the Constitution and the proviso to Article 309 of the Constitution called the Bombay Judicial Service Recruitment Rules, 1956 [hereinafter referred to as 'the recruitment rules']. The said rules have been amended twice, once in the year 1987 and again in the year 1992. Under Section 3 of the Rules, the service consists of two branches- junior and senior. The senior branch consists of District Judges, Principal Judge and all other Judges of the Bombay City Civil Court, Additional District Judges, Chief Judge and Additional Chief Judges of the Small Causes Court, Bombay and Chief Metropolitan Magistrate and Additional Chief Metropolitan Magistrates, as provided in Rule 3(3). The method of recruitment to the senior branch is indicated in Rule 5. Under sub-rule (2) of Rule 5, the District Judges are of two grades (a) District Judges and (b) Small causes Court District Judges. In the original Recruitment Rules of 1956, there were no two grades of District Judges and under Rule 5(2)(i), appointment to the post of District Judges could be made by the Governor by promotion in consultation with the High Court of persons, who have served as Assistant Judges and from the Members of the Bar, on recommendation of the High Court, who have practised as Advocates or pleaders for not less than seven years. Thus, the cadre of District Judge could be filled up either by promotion of the Assistant Judges or by direct recruitment from the Bar. Under the Amended Rules of 1987, there existed two grades of the District Judges viz. the District Judges and Selection Grade District Judges. In accordance with Rule 5(2)(ii) of 1987 Rules, appointment to the post of District Judges could be made by the Governor by promotion from the Members of the Junior Branch, who had ordinarily served as Additional District Judges and by way of direct recruitment on the recommendation of the High Court from the members of the Bar who have practised as Advocates or pleaders for not less than seven years in the High Court or Courts subordinate thereto. In case of direct recruits, a further stipulation was that direct recruits would be first appointed to work as Additional District Judge for a period of two years or for such further period, as may be decided by the Government on the recommendation of the High Court. The Recruitment Rules were again amended in the year 1992 called the Bombay Judicial Service Recruitment(Second Amendment) Rules, 1992 and Rule 5(2)(ii) reads thus:

"Rule 5(2)(ii): District Judges -- Appointment to the posts of District Judges shall be made by the Governor.

(a) by transfer from the judges in the City Civil and Sessions Court, Bombay, who are recruited from the Bar only if they are willing;

(b) by promotion in consultation with the High Court, from the members of the Junior Branch who have been promoted as Additional District Judge; and

(c) by nomination, on the recommendation of the High Court, who has been for not less than seven years an advocate or pleader in the High Court or Courts subordinate thereto."

It is thus apparent that the appointment to the post of District Judges under 1992 Rules, could be made not only by promotion of Additional District Judges and by nomination from amongst the members of the Bar, having not less than seven years practice on the recommendation of the High Court, but also by transfer from the Judges in the City Civil and Sessions Court, who are recruited from the Bar, only if they are willing. It may be borne in mind that when the High Court had recommended for addition of a new sub-rule to Rule 5(2)(ii), so as to make appointment to the post of District Judge by transfer from the Judges in the City Civil and Sessions Court, by suggesting that a new sub-rule to be numbered as clause [c] to be added and that was in the draft rule, but in its final shape, the said new sub-rule was numbered as clause (a) and the pre-existing clause [a] became clause [b] and the pre-existing clause [b] became clause [c] and by this alteration, the Rule as it stands now, has become wholly unworkable. Though Rule 5(2)(ii) was amended by the amended rules of 1992, but Rule 5(2)(ii)(b) remained intact, as a result of which though under 1992 Rules, Rule 5(ii)(b) provides for promotion and Rule 5(2)(ii)(c) provides for nomination on the recommendation of the High Court but while prescribing the proportion between them in sub-rule (b), the old provision remains as it is and the same is quoted herein below:

"(b). ordinarily the proportion of posts filled in by promotion, under sub-clause (a) of clause (ii) and those by appointment from members of the Bar under sub-clause (b) of clause (ii) shall be 50:50."

It would thus be seen that under the Rule as it now stands, appointment from members of the Bar is made under sub-clause [c] and not under sub-clause [b] as indicated above and promotion is made under sub-clause [b] and not under sub-clause [a] as indicated above. The entire confusion is because of the fact that while draft rules suggested an addition of a clause as clause [c], the final rule altered the same and the additional clause was made clause [a]. The seniority in the cadre of District Judges with which we are actually concerned in the present case is governed by clause [c] of Rule 5(2) and the same is extracted herein below:

"[c] Seniority in the cadre of District Judges in case of persons appointment under sub-clauses (a)

and (b) of clause (ii) shall be determined on the basis of their dates of appointment to work as District Judges."

If a literal interpretation of the seniority rules is to be given, then it must be held that there is no rule for seniority of the District Judges, who are appointed by nomination on the recommendation of the High Court from amongst the members of the Bar, having not less than seven years' standing as an advocate, as that would come under sub-clause [c] of Rule 5(2)(ii), whereas the seniority rule provides for determination of inter se seniority amongst the persons appointed under sub-clause [a] and sub-clause [b]. For a proper appreciation of the matter, it would be proper to extract Rule 5(2), as it stands now, after the amendment of 1992:

"Rule 5(2): District Judges, Selection Grade
District Judges and Judges of the Bombay City
Civil Court:-

(i) District Judges shall be of two grades namely:-

(a) District Judges: and
(b) Selection Grade District Judges.

(ii) District Judges --- Appointment to the posts of District Judges shall be made by the Governor.

(a) by transfer from the Judges in the City Civil and Sessions Court, Bombay, who are recruited from the Bar only if they are willing;

(b) by promotion in consultation with the High Court, from the members of the Junior Branch, who have been promoted as Additional District Judges; and

(c) by nomination, on the recommendation of the High Court, who has been for not less than seven years an advocate or pleader in the High Court or Courts subordinate thereto.

(iii)(a) Appointment under sub-clause [c] of clause

(ii) shall not be made unless a person is first appointed to work as an Additional District Judge on probation for a period of two years which may be extended by the High Court from time to time, as it may deem fit.

(a-1) During the period of probation and until expressly confirmed by a written order the services of an appointee shall be terminated by one month notice on either side, without any reason being assigned therefore or by payment of salary for the period of notice or the unexpired portion thereof.

[a-2] He/she shall be required to pass the language examination according to the rules prescribed in that behalf unless he has

already passed, or has been exempted from passing those examinations.]

(b) ordinarily the proportion of posts filled in by promotion, under sub-clause (a) of clause (ii) and those by appointment from members of the Bar under sub-clause (b) of clause (ii) shall be 50:50; [c] Seniority in the cadre of District Judges in case of persons appointment under sub-clauses (a) and (b) of clause (ii) shall be determined on the basis of their dates of appointment to work as District Judges:

Provided that, if more than one person is so appointed to work as District Judge on the date, seniority inter se as between them shall be in the order fixed by the High Court."

In course of hearing, to our query, the counsel appearing for the High Court, on instructions, submitted that there is not a single person in the cadre of District Judge, who has come by way of transfer from the Judges in the City Civil and Sessions Court, who had been recruited from the Bar and only one person who had come, had gone back.

Mr. Nageshwara Rao, appearing for the promotees, contended that the administrative decision of the High Court, determining inter se seniority between the promotees and direct recruits has been made on the basis of the Judgment of this Court in Balasaheb Vishnu Chavan vs. State of Maharashtra and Ors., 1984(2) S.C.C. 675, in which case, the provisions of the Recruitment Rules, as it stood prior to its amendment in 1987 was under consideration. At that point of time, there was no rule for determination of inter se seniority between the direct recruits and promotees, which was brought about by amendment of 1987 and has also been retained under the 1992 Rules. The question for consideration in the aforesaid case was, though a member of the Bar is recruited as a District Judge, he may be asked to serve as an Assistant Judge for a specified period if he is below the prescribed age and, therefore, whether such appointment would make him a member of the cadre of Assistant Judge or he can be held to be a District Judge, but has been required to serve as an Assistant Judge for gaining experience. On construction of the relevant provisions of the Rules, the Court held that when a member of the Bar is recruited as a District Judge and is asked to serve as an Assistant Judge for a specified period, if he is below the prescribed age, then his functioning as Assistant Judge would not be strictly in law make him as a member of the cadre of Assistant Judge, as there is no provision for direct recruitment to the cadre of Assistant Judge. Consequently, such a person cannot be called as a member of the Assistant Judge subject to the rule of seniority applicable to the regular members of that cadre who are appointed only by promotion from the Junior Branch. According to Mr. Nageshwara Rao, the aforesaid decision could not be relied upon for determining the inter se seniority between the direct recruit and promotee District Judges, in view of the specific rule dealing with seniority. Mr. Nageshwara Rao contends that on a plain literal meaning being given to the language used in Rule 5[2][c], the seniority in case of a direct recruit has to be reckoned from the date, he is appointed to work as District Judge and not from the date, he is appointed to work as an Additional District Judge. The learned counsel, in

support of the aforesaid contention also relies upon Rule 5(iii)(a), which unequivocally puts an embargo for an appointment as District Judge from amongst the members of the Bar unless such person on being selected is first appointed to work as Additional District Judge on probation for a period of two years, which may be extended by the High Court from time to time, as it may deem fit. Mr. Nageshwara Rao, therefore, contends that a promotee District Judge on being promoted from the post of Additional District Judge, is entitled to reckon his seniority in the cadre from the date of promotion, whereas a direct recruit District Judge by nomination on the recommendation of the High Court from amongst the members of the Bar, who have practised for not less than seven years, would be entitled to reckon his seniority in the cadre of District Judge only when he is appointed to work as a District Judge and not the initial period of probation for two years when he is appointed to work as an Additional District Judge.

Mr. M.L. Verma, the learned senior counsel, appearing for the direct recruits as well as Mr. Bhimrao N. Naik, appearing for respondent No. 3, however contended that the seniority rule as provided in Rule 5[2][c] does not deal with the seniority in the cadre of District Judge and those members, who are directly recruited from the Bar on the recommendation of the High Court, after being selected and the aforesaid rule of seniority is intended for determining inter se seniority between the promotees and those who are appointed as District Judge by transfer from the Judges in the City Civil and Sessions Court. According to Mr. Verma, even the prescription of ratio of 50:50 in Rule 5(2)(b) is between the transferee District Judges and the promotee District Judges and not between the direct recruit District Judges and promotee District Judges. The learned counsel urged that in the cadre of District Judges, the quota of promotees has become much more than, what is provided and, therefore, those of the promotees who have usurped the quota meant for direct recruits, cannot be given any seniority. We fail to understand how this contention could be advanced in the teeth of his submission that Rule 5(2)(b) does not provide for any quota for the direct recruits. We also are not in a position to appreciate the contention that the inter se seniority rule in the cadre of District Judge does not provide for seniority of the direct recruits, which has to be in accordance with the Maharashtra Civil Service (Regulation of Seniority) Rules, 1982. In fact the Registrar of the High Court, in the affidavit filed, has taken the aforesaid stand. In our considered opinion, the stand taken by the High Court as well as by the direct recruit District Judges is wholly unsustainable and it is unimaginable that a rule providing for recruitment to the cadre of District Judge, which is essentially composed of direct recruits and promotees and a rule of seniority has been provided, but does not cover the case of direct recruit District Judges. The entire anomaly and confusion is on account of the mistake that was committed while inserting another clause under the amendment of 1992. As has been stated earlier, as on date there is not a single person, who has come on transfer from the category of Judges in the City Civil and Sessions Court and is working as District Judge. Rule 5(2) of the 1992 Rules, therefore, require necessary alteration, either by altering existing sub-clause [a] as sub-clause [c], sub-clause [b] as sub-clause [a] and sub-clause [c] as sub-clause [b] and then in sub-clause (iii)(a) by altering sub-clause [c] as sub-clause [b] or keeping Rule 5(2)(ii) and Rule (2)(iii)(a)

as it stands and altering and amending clauses {b} and {c}. It appears that the State Government or the High Court have not applied their mind to the amendments carried out and necessary attention has not been bestowed. The counsel appearing for the High Court on instructions however submitted that even from 1992 till the Administrative decision, which is being impugned in the present case, the High Court has been acting in accordance with the draft rules that had been submitted and therefore, no inconvenience has been caused. This indicates the real intention of the Court as well as that of the Government. We, therefore, direct that appropriate amendment of Rule 5(2) of the Recruitment Rules be made at an early date. Notwithstanding the confusion which writ large in the provisions, as stated earlier, we have no manner of doubt that the seniority of the direct recruit District Judges in the cadre would reckon only from the date, they are appointed to work as District Judge. The expression "to work as" both in Rule 5(2)(iii)(a) and Rule 5[2][c] must carry the same connotation. If under Rule 5(2)(iii)(a), direct recruit cannot be appointed as a District Judge unless he is first appointed to work as Additional District Judge for a period of two years, it is difficult for us to comprehend that while interpreting the same expression "to work as District Judge" in Rule 5[2][c] can be given a meaning that it would reckon from the date of appointment, as has been done by the Bombay High Court in its administrative decision. In other words, a conjoint reading of the provisions, providing for appointment as District Judge from amongst the members of the Bar by nomination on the recommendation of the High Court as well as the embargo on such appointment, as provided in Rule 5(2)(iii)(a) makes it explicitly clear that a person when is selected for being appointed as District Judge, he is allowed to work initially as an Additional District Judge on probation for a period of two years and that period cannot be counted as service in the cadre of District Judge for seniority. His services in the cadre of District Judge for seniority would start reckoning on completion of his probation for the period of two years or any further period, as extended by the High Court and he is allowed to work as District Judge. Incidentally, it may be mentioned that after being selected for being appointed as District Judge, when the direct recruits are appointed to work as an Additional District Judge on probation for two years, they get the lesser salary as is meant for Additional District Judge and do not get the salary of a District Judge. From the records, it also transpires that such direct recruits, on completion of their probation as Additional District Judge, are appointed as District Judges, as was done in case of respondent No. 3 by order dated 8th of January, 1992. In the aforesaid premises, we have no hesitation to hold that the administrative decision of the Bombay High Court dated 6th of May, 2000, on the basis of the decision of the Committee dated 12th of January, 2000, is erroneous and we accordingly strike down the same. We further hold that the seniority of a promotee District Judge would reckon from the date of his promotion, from which date he is appointed to work as District Judge and in case of a direct recruit, the same would be the date from which he is appointed to work as a District Judge, after completion of the period or probation of two years and not from the initial appointment to work as Additional District Judge.

This writ petition is accordingly allowed.

.....J.
(G.B. PATTANAIAK)

.....J.
(S.N. PHUKAN)

February 20, 2002.

JUDIS