

PETITIONER:
STATE OF ASSAM & ANR.

Vs.

RESPONDENT:
KUSESWAR SAIKIA AND ORS.

DATE OF JUDGMENT:
17/10/1969

BENCH:
HIDAYATULLAH, M. (CJ)
BENCH:
HIDAYATULLAH, M. (CJ)
SHELAT, J.M.
VAIDYIALINGAM, C.A.
GROVER, A.N.
RAY, A.N.

CITATION:
1970 AIR 1616 1970 SCR (2) 928
1969 SCC (3) 505
CITATOR INFO :
R 1975 SC 613 (11, 38, 39, 42)
RF 1977 SC2328 (14)
R 1979 SC 193 (38)
R 1980 SC1426 (22)
R 1982 SC1579 (16)

ACT:
Constitution of India, Arts. 233, 235,--Promotion of a person in judicial service as Additional District Judge Competent authority-Power exercisable under Art. 233 or Art. 235.
Civil Courts Act Assam Amendment XII of 1967-Designation of Subordinate Judge altered to Assistant District Judge thus taking away High Court's jurisdiction under Art. 235-Remedy lies in rescinding the law.

HEADNOTE:
In exercise of the power conferred by Art. 233 of the Constitution and in consultation with the High Court the Governor of Assam "appointed" a person belonging to the State Judicial Service (Junior Grade I) to officiate as Additional District & Sessions Judge. In a petition for a writ of quo warranto the High Court held the "appointment" void because in the view of the High Court this was a case of promotion of a person belonging to the Judicial Service of the State and the High Court was the authority to make the promotion under Art. 235.
Also; the Assam Legislature amended the Civil Courts Act by Act XII of 1967 by which the designation of Subordinate Judge was altered to Assistant District Judge. The High Court was of opinion that by this device which the High Court described as "a fraud upon the Constitution" the power of promotion vested in the High Court under Art. 235 in respect of persons belonging to the Judicial Service, of a State and holding posts inferior to the post of the District Judge, was taken away.
Allowing the appeal,
HELD : (i) The expression District Judge includes an

additional District Judge and an additional Sessions Judge and they rank above those persons whose promotion is vested in the High Court under Art. 235. Therefore, the promotion of persons to be additional District Judges or Additional Sessions Judges is not vested in the High Court. That is the function of the Governor under Art. 233. This follows from the language of the Article itself. The Article, if suitably expanded, reads :

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

It means that appointment as well as promotion of persons to be District Judges is a matter for the Governor in consultation with the High Court. The Article concerns initial appointment and initial promotion of persons to be either District Judges or any of the categories included in it. Further promotion of District Judges is a matter of control of the High Court. [932 E-G]

(ii) The High Court is not right in thinking that it can ignore the hierarchy of courts in Assam as established by law and treat the change as of no consequence. The change made by the Assam Amendment Act XII of 1967 is likely to lead to an impairment of the independence of the

929

judiciary at lowest levels whose promotion which was vested by the Constitution in the High Court advisedly, will no longer be entirely in the hands of the High Court. But the remedy is not to go against the Civil Courts Act as amended, but to have the amendment rescinded. [934 B-C]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 358 of 1969. Appeal from the judgment and order dated February 5, 1969 of the Assam and Nagaland High Court in Civil Rule No. 222 of 1968.

M. C. Setalvad, Naunit Lal and S. N. Choudhury, for the, appellants.

Sarjoo Prasad, R. B. Datar and S. N. Prasad, for respondent No. 4.

S. K. Nandy, for respondent No. 5.

The Judgment of the Court was delivered by Hidayatullah, C.J. This is an appeal by certificate under Art. 12 of the Constitution against the judgment and order of the High Court of Assam, February 5, 1969. It is filed by the State of Assam and the Legal Secretary to the Government of Assam and challenges a writ of quo warranto issued against Upendra Nath Rajkhowa, Distt. & Sessions Judge, Darrang at Tezpur declaring that he was not entitled to hold that office. It was issued at the instance of Respondents 1 to 3 in this appeal. These respondents on conviction by Upendra Nath Rajkhowa in a sessions trial, challenged their conviction inter alia on the ground that Shri Rajkhowa was not entitled to hold the post of District and Sessions Judge, Darrang. The High Court held that the 'promotion' of Rajkhowa by the Governor as Additional District Judge by notification LJJ 74/66/65 dated 19-6-67 purporting to act under Art. 233* was void because he could only be promoted by the High Court acting under Art. 235** Consequently his further appointment as Dis-

*Art. 233. "(1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

****Art. 235.** "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 authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law."

930

trict Judge by the Governor by notification LJJ 94/67/14 dated 28-7-1967 was also declared by the High Court to be void. The High Court, however, held that Rajkhowa's simultaneous 'promotion' as Addl. Sessions Judge was valid as that post was not included in the judicial service of the State and the Governor was competent to make the appointment. The High Court also held that his further appointment as Sessions Judge was also valid. The High Court, therefore, did not disturb the conviction and also did not pronounce any opinion on whether the judgments given as District Judge by Rajkhowa were void since that question did not arise on a petition for a writ of quo warranto.

The Assam-Judicial Service was constituted by a notification of the Government of Assam issued on August 25, 1952. The Senior Branch of the service was known as State Judicial Service (Senior) and it consisted of the following posts

Senior Grade I

1. Registrar.
2. Legal Remembrancer.
3. District Judges.

Senior Grade 11

Additional District Judges.

On April 9, 1954, the State Judicial Service (Junior) was created. Separate rules governed the junior service. The following posts were included :

Junior Grade I

1. Subordinate Judges.
2. Deputy Registrar.

Junior Grade 11

1. Munsiffs.
2. Assistant Registrar.

Rajkhowa was originally a Munsiff in grade 11. The Chief Justice of the High Court appointed him as Deputy Registrar and thus he was promoted to Grade I of the Junior Service.

On June 19, 1967 the following notification was issued :

"No. LJJ.74/66/65-The services of Sri U. N. Rajkhowa, Deputy Registrar, High Court of Assam and Nagaland being replaced at the disposal of the Government. The Governor of Assam in consultation with the, High Court of Assam and Nagaland, and in exercise of powers conferred by Article 233 of the Constitution read

931

with Rule 5(ii) of the, Assam Judicial Service (senior) Rules, 1952 is pleased to appoint Sri uppendr a Nath Rajkhowa to officiate as Additional District and Sessions Judge, Lower

Assam Districts with Head quarters at Now gong with effect from the date he takes over as Service Sri M. C. Mahajan.

Sd. B. Sarma,
Secy. to the Government,
Law Department".

It is this 'appointment' under Article, 233 which is considered by the High Court to be void. According to the High Court this was a case of 'promotion' of a person belonging to the judicial service of the State and the High Court was the authority to make, the promotion under Art. 235. In this appeal the view of the High Court is challenged.

Chapter VI of Part VI of the, Constitution deals with Subordinate Courts. The history of this Chapter and why judicial services came to be provided for separate from other services has been discussed in The State of West Bengal v. Nripendra Nath Bagchi(1). This service was provided for separately to make the office of a District Judge completely free of executive- control. The Chapter contains six articles (233 to 237). We are not concerned with Art. 237 in the present case. Article 235 vests in the High Court the control over District Courts and Courts subordinate thereto, including the posting and promotion and grant of leave to persons belonging to the judicial service of a State and holding, any post inferior to the post of District Judge. By reason of the definitions given in Art. 236, the expression 'Judicial Service' means a service consisting exclusively of persons intended to fill the post of District Judge, and other Civil Judicial posts inferior to the District Judge and the, expression "District Judge" includes among others an additional District Judge and an additional Sessions Judge. The promotion of persons belonging to the judicial service but holding post inferior to a, District Judge vests in the High Court. As the expression District Judge, includes an additional District Judge and an additional Sessions Judge, they rank above those persons whose promotion is vested in the High Court under Art. 235. Therefore, the, promotion of persons to be additional District Judges on additional Sessions Judges is not vested in the High Court. That is the function of the, Governor under Art. 233. This follows from the language, of the, article itself

"(a) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be

(1) [1966] 1 B.C.R. 771.

5SupCI/70-14

932

made by, the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

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

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

(2) 'promotion' of 'a District Judge and not promotion 'to be a District Judge' is also to be made by the Governor in consultation with the High Court vide Art. 233.

The High Court gives the example of selection grade posts in the Cadre of District Judges which according to it is a case of promotion of a District Judge.

The reading of the article by the High Court is, with

respect, contrary to the grammar and punctuation of the article. The learned Chief Justice seems to think that the expression 'promotion of' governs 'District Judges' ignoring the comma that follows the word 'of'. The article, if suitably expanded, reads as under :

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

It means that appointment as well as promotion of persons to be District Judges is a matter for the Governor in consultation with the High Court and the expression 'District Judge' includes an additional District Judge and an additional Sessions Judge. It must be remembered that District Judges may be directly appointed or may be promoted from the subordinate ranks of the judiciary. The article is intended to take care of both. It concerns initial appointment and initial promotion of persons to be either District Judges or any of the categories included in it. Further promotion of District Judges is a matter of control of the High Court. What is said of District Judges here applies equally to additional District Judges and Additional Sessions Judges. Therefore when the Governor appointed Rajkhowa an Additional District Judge, it could either be an 'appointment' or a promotion under Art. 233. If it was an appointment it was clearly a matter under Art. 233. If the notification be treated as 'promotion' of Rajkhowa from the junior service to the senior service it was a 'promotion' of a person to be a District Judge which expression, as shown above, includes an Additional District Judge. In our opinion it was the latter.

933

Thus there is no doubt that the appointment of Rajkhowa as Additional District Judge by the Governor was a promotion and was made under Art. 233. It could not be made under Art. 235 which deals with posts subordinate to a District Judge including an additional District Judge and an additional Sessions Judge. The High Court was in error in holding that the appointment of Rajkhowa to the position of an Additional District Judge was invalid because the order was made by the Governor instead of the High Court. The appointment or promotion was perfectly valid and according to the Constitution.

This brings us to the next point in the case which arises as a side issue involving the Legal Secretary, who is also an appellant here. The Civil Courts Act was amended by the Assam Legislature by Act XII of 1967 which came into force on 16th August, 1967. The designation of subordinate judge was altered to Assistant District Judge. On August 17, 1967 new rules for the Assam Judicial Services were brought into force. The Judicial Service was reconstituted as follows

Grade I.

- (1) District and Sessions Judge.
- (2) Registrar.
- (3) Presiding Officer, Industrial Tribunal.
- (4) Presiding Officer, Labour Court.

Grade II.

- (1) Additional District Magistrate.
- (2) Assistant District Judge.
- (3) Deputy Registrar.

Grade III.

- (1) Munsiff.
- (2) Judicial Magistrate.
- (3) Sub-Divisional Magistrate (Judicial).
- (4) Assistant Registrar.

The High Court was of opinion that this was deliberately done to grab at the power of promoting subordinate judges by

taking advantage of the definition of District Judge which includes an Assistant District Judge. By this device, which the High Court described as 'a fraud upon the Constitution' the power of promotion vested in the High Court in respect to persons belonging to the Judicial Service of a State and holding posts inferior to the post of the District Judge the jurisdiction of the High Court under Art. 235 was taken away. Formerly, the subordinate service was

934

composed of two grades and promotion between the two grades was made by the High Court. Under the new rules there is only one grade (i.e. grade III) in which Art. 235 can operate if at all. Since all the posts there are equal and carry equal pay there is no scope for promotion at all. The High Court is thus right that there is no scope for the power of the High Court to make promotions in the case of persons below the rank of District Judges (which term includes an Assistant District Judge). The High Court was thus far right-but the High Court is not right in thinking that it can ignore the hierarchy of courts in Assam as established by law and treat the change as of no consequence. The remedy is not to go against the Civil Courts Act as amended, but to have the amendment rescinded. We are of the view that the change is likely to lead to an impairment of the independence of the judiciary, at the lowest levels, whose promotion which was, vested by the Constitution in the High Court advisedly, will no longer be entirely in the hands of the High Court. The remedy for it is by amendment, of the law to the former position. We may say that we do not approve of the change of more nine without any additional benefits.

The High Court was unnecessarily hard upon the Legal Secretary. It is proved that this amendment was first thought of several years ago when there was some other Legal Secretary. It is also established that the amendment was intended to bring in the nomenclature existing in some other States without reprising what effect it would have upon the operation of Art. 235 in the State. The remarks of the Chief Justice against the Legal Secretary were unmerited. For these reasons we allow the appeal and set aside the writ of quo warranto issued by the High Court, but in the circumstances of the case we make no order about costs.

R.K.P.S.

Appeal allowed.

935